

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

DOCKET YEAR. 1946

No. 280

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR

vs.
MARIE JERREN.

ON WRIT TO THE SUPREME COURT, APPELLATE DIVISION, SECOND
DEPARTMENT, OF THE STATE OF NEW YORK.

FILED NOVEMBER 2, 1946.

(24,983)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 700.

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

MARIE JENSEN.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD
DEPARTMENT, OF THE STATE OF NEW YORK.

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a Court of Appeals, State of New York.

In the Matter of the Claim of MARIE JENSEN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law,
against
SOUTHERN PACIFIC COMPANY, Employer and Self-insurer, Appellant.

APPEAL BOOK.

Burlingham, Montgomery & Beecher, Attorneys for Appellant,
27 William Street, New York City.

Egbert E. Woodbury, Attorney General.

Jeremiah F. Connor, Counsel, Workmen's Compensation Commission.

1 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of MARIE JENSEN, Widow, and HAROLD Jensen and Evelyn Jensen, Children, for Compensation under the Workmen's Compensation Law Upon the Death of Christen Jensen; Southern Pacific Company, Employer and Self-insurer, Appellant.

Statement Under Rule 41.

The deceased workman received the fatal injury out of which this claim arises on August 15, 1914. On August 17, 1914, the claimant gave notice of the accident to the Commission. On September 10, 1914, notice of claim was given by the Commission to the employer, September 14, being the date set for hearing. The names of the parties are as given above.

This proceeding was instituted before the State Workmen's Compensation Commission. The relief sought was an award of compensation and an award was made by the Commission. The cause was brought to this court by appeal from the award, pursuant to Section 23 of the Workmen's Compensation Law.

2 *Notice of Appeal.*

Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of MARIE JENSEN, Widow, and HAROLD Jensen and Evelyn Jensen, Children of Christen Jensen, Deceased, for Compensation under the Workmen's Compensation Law; Southern Pacific Company, Employer and Self-insurer, Appellant.

SIRS: Please take notice that the Southern Pacific Company hereby appeals to the Appellate Division of the Supreme Court, Third Department, from the award of the State Workmen's Com-

pensation Commission made herein and entered in the office of said Commission, October 9, 1914.

Dated, New York, October 9, 1914.

Yours, etc.,

BURLINGHAM, MONTGOMERY &
BEECHER,

Attorneys for Southern Pacific Co.

Office and Post Office Address, 27 William Street, Borough of Manhattan, City of New York.

3 To:

Joseph H. Hollands, Esq., Clerk, Supreme Court, Appellate Division, Third Department.

John A. Parsons, Esq., Attorney-General.

State Workmen's Compensation Commission.

Jeremiah F. Connor, Esq., Counsel, State Workmen's Compensation Commission, and

Marie Jensen, Claimant, 103 Le Roy Street, New York City.

Employer's First Notice of Injury.

Form C-1.

To preserve your rights under the law you must mail this notice, properly filled out and signed by you, or by some one for you, by registered letter to the State Workmen's Compensation Commission, at 1 Madison Avenue, New York City, within ten days after your injury.

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Claims.

Employee's First Notice of Injury.

Claim No. —.

Case of — — —.

Full name of injured employee: Christen Jensen.

Address: 103-5 Leroy St., New York.

Name of employer: Southern Pacific Co.

Address: Pier 49 N. R., New York.

Address where accident happened: Pier 51 N. R., New York.

4 Date of accident: August 15, 1914, 10:15 A. M.

Cause of accident: Became jammed between top of port of S. S. El Oriente and electric freight truck being operated by deceased.

Nature and extent of injury: Death.

Are you likely to be disabled more than two weeks? (Careful answer must be given.)

Have you notified your employer? Yes.

When? Aug. 17, 1914.

How? (By delivery of notice or by registered letter.) Delivery of notice.

What was your daily wage? \$2.50.

Where are you now?

Did you request your employer to furnish medical service?

Has he done so?

Name of attending physician:

Address:

Signed, this 17th day of August, 1914, at New York, N. Y.

(Sign here)

MARIE JENSEN.

(Full name) Widow.

Address to which mail should be sent: 103-5 Leroy St., New York.

(See other side.)

Send This Part to the Commission,

At No. 1 Madison Avenue,

New York, N. Y.

.....
Detach here—Fill Out Lower Part and Deliver This To Your Employer.

To preserve your rights under the law you must have delivered or mailed by registered letter to your employer within ten days after your injury this report properly filled out and signed by you or someone for you.

5 State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Claims.

Employee's First Notice of Injury.

Claim No. —.

Case of — — —.

N. Y., August 17, 1914.

Southern Pacific Co. (Employer), Pier 49 N. R., New York

(Address):

I hereby notify you, as required by law, that I was injured at 10:15 A. M. on the 15th day of August, at Pier 51 N. R., New York.

(Location where injury occurred.)

My injury was caused by: Became jammed between top of port of S. S. El Oriente and electric freight truck being operated by deceased.

The nature and extent of my injury is Instant death.

I am now at —.

(State where at present?)

I am being attended by Dr. — — and I now request, as required by law, that you supply me with medical attendance.

(Sign here)

MARIE JENSEN.

(Full name) Widow.

Address to which mail should be sent: 103-5 Leroy St., New York.

(See other side.)

Send This Part To Your Employer.

6

Employer's First Report of Injury.

Form C-2.

Copy.

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. —.

Case of — —.

Employer's First Report of Injury.

INSTRUCTIONS.—The employer must fill out this form and return same to the Commission, at its New York Office, within ten days after every accident which causes any loss of work or requires medical attendance. (See penalty, Sec. 111, of the law printed on the back hereof.) In filling out this form use pen or typewriter.

This notice is given subject to the annexed protest which is made a part hereof.

Employer, Place and Time: Employer's name, Southern Pacific Co., a Kentucky corporation.

Office address, Pier 49 N. R., New York.

(Street and number, city or village and county.)

Business, goods produced, work done or kind of trade or transportation, Transportation by steamships engaged solely in interstate commerce.

Location of plant or place of work where accident occurred, S. S. El Oriente, lying at Pier 51 N. R., New York.

(Street and number.)

In what city or village? New York. County? New York?

7 Date of accident, 15th day of August, 1914; hour of day, 10:15 A. M.

Did accident happen on the premises? Yes. At the plant?

Away from the plant of employer? — If away from the plant, state where.

Was employee injured in course of employment? Yes.

The Injured Employee: Give full name of injured employee, Christian Jensen.

Address, 103-105 Leroy St., New York.

(Street and number, city or village and county.)

Sex, Male. Age, 38. Speak English? Yes. If not, what language?

Occupation when injured? Longshoreman.

Was injured employee doing his regular work? Yes. If not, what work?

How long was injured person in your employment? Four years.

Piece or time worker? Time. Wages or average earnings per day? \$2.50.

The Injury: Describe in full how the accident occurred: Christian Jensen was trucking lumber from lower 'tween deck of S. S. El Oriente on electric truck, and while descending skid he stopped truck and backed in order to straighten truck and clear rail of skid. The truck was backed up and Jensen was jammed between top of port of the ship and frame of truck.

State nature and extent of injury: Died immediately after accident.

(If amputation was necessary, state what part amputated.)

Medical Attendance:

8 Was medical attendance provided by you? —.

How soon after accident? —.

Name and address of physician: Ambulance called from St. Vincent's Hospital, and injured man pronounced dead by Dr. Davis of the ambulance.

To what hospital was employee sent?

Address of hospital:

If not sent to hospital, where is he? Body removed to Morgue by Police Dept.

Are you still providing medical attendance? —.

If injured employee has already returned to work, give date of return: —. If so, is he fully recovered and earning full wages? —.

How many working days did he lose on account of accident? —.

If not returned to work, probable length of disability? —.

(Give your best estimate.)

Is injured employee married or single? Married.

Insurance:

Is insurance carried in the State Fund? No. If not, in what company or association? Have been granted permission by Commission to carry own insurance.

Signed, this 15th day of August, 1914, at New York, N. Y.

Firm name, Southern Pacific Company.

Signed, C. W. Jungen; Official title, Manager, Atlantic S. S. Lines.

Protest.

Southern Pacific Company makes the annexed report under protest, upon the grounds, among others, that it cannot constitutionally or lawfully be required to make such report or to perform any of the acts prescribed by the Workmen's Compensation Law of the State of New York or by any regulation of the Workmen's Compensation Commission in respect thereof; that the company's business in the State of New York consists solely of interstate commerce, to wit, the operation and repair by the Company of steamships of the State of Kentucky used exclusively in interstate commerce, and that said law cannot constitutionally be made applicable, and is not by its terms applicable, to the company or to any of its employees; and that in making this report the company does not intend to exercise any option under Section 114 of said law to accept and become bound by the provisions thereof, but makes this report under protest and duress, for the purpose solely of avoiding present penalties and present controversy and litigation, and without prejudice to its right hereafter to contest the applicability of the said law to the Company or to any of its employees, and to contest the constitutionality of any and all provisions of said law, or the constitutionality or legality of any and all orders of the said Commission.

Witnesses:

Jas. O'Brien, 17 Abbington St., New York.

Chris. Kautz, 147 Charles St., New York.

Wm. Torrison, 138 Perry St., New York.

Section 111. Record and Report of Injuries by Employers. Every employer should keep a record of all injuries fatal or otherwise received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury, a report thereof shall be made in writing by the employer to the Commission, upon blanks to be procured from the Commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the Commission. An employer who refuses or neglects to make a report as required by this action shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.

NOTICE.—If injured employee is not fully recovered before this notice is sent by you, the Commission will send you form No. C-11 for 2nd notice; report thereon at proper time. (See instructions thereon.)

(Stamped:) Club Insurance.

Notice of Hearing.

Form C-28.

(Make out in Triplicate.)

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. 28845.

Case of Christen Jensen.

Notice in Death Claim that Final Award will be Considered.

- 11 Mrs. Marie Jensen, (Claimant), 103-105 Le Roy Street,
City.
Southern Pacific Co., (Employer), Pier 49, N. R., City.
Self-Insurer (Insurer).

GENTLEMEN: Relative to Christen Jensen, injured August 15th, 1914, while in the employ of Southern Pacific Co., the reports, proofs and other documents furnished to the Commission seem to establish the following:

Average annual earnings \$—. Average daily wages \$2.50.

Average weekly wages (basis for compensation), \$14.42.

Injured August 15th, 1914. Death resulted August 15th, 1914.

Dependents.

Wife (or dependent husband): Name, Marie Jensen, age 29.
Children under 18 years of age:

Name.	Age.	Date of birth.
Harold Jensen.....	7	July 4th, 1907.
Evelyn Jensen.....	3	May 14th, 1911.

The case will be considered for final award on September 14th, 1914, at 10 o'clock A. M., at 1 Madison Avenue, New York City, N. Y.

If you have information contrary to the foregoing, please communicate the same to the Commission prior to such date.

STATE WORKMEN'S COMPENSATION
COMMISSION.

Dated, September 10th, 1914.

HE.

12 *Findings of Fact, Conclusions of Law and Award.*

State Workmen's Compensation Commission.

No. 28485.

In the Matter of the Claim of MARIE JENSEN for Compensation under the Workmen's Compensation Law upon the Death of Christen Jensen.

SOUTHERN PACIFIC COMPANY, Employer and Self-insurer.

This claim came on for hearing before the State Workmen's Compensation Commission, at the office of the Commission, No. 1 Madison Avenue, New York City, on September 14, 1914. It was continued to October 9, 1914, when an award was made. The members of the commission present were Commissioners Mitchell, Mosher and Wainwright.

Appearances:

Jeremiah F. Connor, Esq., counsel for State Workmen's Compensation Commission.

Burlingham, Montgomery & Beecher (Norman B. Beecher, Esq., of counsel), attorneys for Southern Pacific Company.

All the evidence submitted before the Commission having been heard, the Commission makes its findings of fact and ruling of law and award as follows:

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Findings of Fact.

1. Christen Jensen, the deceased workman, was, on August 15, 1914, an employee of the Southern Pacific Company, a corporation of the State of Kentucky, where it has its principal office. It also has an office at Pier 49, North River, New York City. The Southern Pacific Company at said time was, and still is, a common carrier by railroad. It also owned and operated a steamship *El Oriente*, plying between the ports of New York and Galveston, Texas.

2. On August 15, 1914, said steamship was berthed for discharging and loading at Pier 49, North River, lying in navigable waters of the United States.

3. On said date Christen Jensen was operating a small electric freight truck. His work consisted in driving the truck into the steamship *El Oriente* where it was loaded with cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with Pier 49, North River, and thence upon the pier, where the lumber was unloaded from the truck. The ship was about 10 feet distant from the pier. At about 10:15 A. M., after Jensen had been doing such work for about three hours that morning, he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship *El Oriente*, which was being transported from Galveston, Texas, to New York City. Jensen stood on the rear of

he truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken and in this manner he met his death.

14 4. The business of the Southern Pacific Company in this State consisted at the time of the accident and now consists solely in carrying passengers and merchandise between New York and other States. Jensen's work consisted solely in moving cargo destined to and from other States.

5. Jensen left him surviving Marie Jensen, his widow, 29 years of age, and Howard Jensen, his son, seven years of age, and Evelyn Jensen, his daughter, three years of age.

6. Jensen's average weekly wage was \$19.60 per week.

7. The injury was an accidental injury and arose out of and in the course of Jensen's employment by the Southern Pacific Company and his death was due to such injury. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another.

Ruling of Law.

This claim comes within the meaning of Chapter 67 of the Consolidated Laws as re-enacted and amended by Chapter 41 of the Laws of 1914, and as amended by Chapter 316 of the Laws of 1914.

Award.

Award of compensation is hereby made to Marie Jensen, widow of the deceased, at the rate of \$5.87 weekly during her widowhood with two years' compensation in one sum in case of her remarriage; to Harold Jensen, son of the deceased, at the rate of \$1.96 per week and to Evelyn Jensen, daughter of the deceased, at the rate of \$1.96 per week until the said Harold Jensen and Evelyn Jensen respectively shall arrive at the age of eighteen years, and there is further allowed the sum of One hundred (\$100) Dollars for funeral expenses.

Dated, October 9, 1914.

STATE WORKMEN'S COMPENSATION
COMMISSION.

ROBERT DOWLING, *Chairman.*

JOHN MITCHELL.

THOMAS DARLINGTON.

H. T. MOSHER.

J. MAYHEW WAINWRIGHT.

Objections to Award.

At the hearing objection was made to the making of an award upon the grounds that the Act does not apply because the workman was engaged in interstate commerce on board a vessel of a foreign corporation of the State of Kentucky which was engaged solely in interstate commerce; that the injury was one with respect to which Congress may establish, and has established, a rule of liability, and under the language of Section 114, the Act has no application; on the ground that the Act includes only those engaged in the operation of vessels other than those of other states and countries in foreign and interstate commerce, while the work upon which the deceased workman was engaged at the time of his death was part of the operation of a vessel of another state engaged in interstate commerce, and hence does not come within the provisions of the Act; further, that the Act is unconstitutional, as it constitutes a regulation of and burden upon commerce among the several states in violation of

Article I, Section 8, of the Constitution of the United States; 16 in that it takes property without due process of law in violation of the 14th Amendment of the Constitution; in that it denies the Southern Pacific Company the equal protection of the laws in violation of the 14th Amendment of the Constitution because the Act does not afford an exclusive remedy, but leaves the employer and its vessels subject to suit in admiralty; also that the Act is unconstitutional in that it violates Article III, Section 2, of the Constitution conferring admiralty jurisdiction upon the court of the United States.

Stipulation.

It is agreed that the report of the Deputy Commissioner in this case, Form C-32, the proof of death, the resolution making award, and any papers other than those contained in the printed papers on appeal, may be omitted from the record.

It is agreed that the above papers and records are true copies of papers and records on file in the office of the State Workmen's Compensation Commission, and that the same need not be certified; and it is agreed that the foregoing papers on appeal be filed and that the appeal herein be heard on this record.

Dated, New York, February —, 1915.

JAMES A. PARSONS,

Attorney General for the State of New York.

JEREMIAH F. CONNOR,

Attorney for State Workmen's Compensation Commission.

BURLINGHAM, MONTGOMERY &

BEECHER,

Attorneys for Southern Pacific Company.

17 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of MARIE JENSEN for Compensation under the Workmen's Compensation Law upon the Death of Christen Jensen; Southern Pacific Company, Employer and Self-insurer.

STATE OF NEW YORK,
County of New York, ss:

Ray Rood Allen, being duly sworn, says:

I am an attorney in the office of Burlingham, Montgomery & Beecher, the attorneys for the appellant in this proceeding. No opinion was written by the State Workmen's Compensation Commission in this case.

RAY ROOD ALLEN.

Sworn to before me this 12 day of January, 1915.

ROSCOE H. HUPPER,
Notary Public, New York County, No. 1621.

18 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, Held at the Appellate Division Court-rooms, in the City of Albany, N. Y., Commencing on the 2nd Day of March, 1915.

Present:

Hon. Walter Lloyd Smith, Presiding Justice.

Hon. John M. Kellogg,

Hon. George F. Lyon,

Hon. Wesley O. Howard,

Hon. John Woodward,

Associate Justices.

In the Matter of the Claim of MARIE JENSEN, Widow, and HAROLD Jensen and Evelyn Jensen, Children of Christen Jensen, Deceased, for Compensation under the Workmen's Compensation Law, Respondents,

against

SOUTHERN PACIFIC COMPANY, Employer and Self-insurer, Appellant.

The above named Southern Pacific Company having appealed from the award or decision of the Workmen's Compensation Commission entered in the office of said Commission on the 9th day of October, 1914, whereby compensation was awarded to the above named

19 Marie Jensen at the rate of \$5.87 weekly during her widowhood with two years' compensation in one sum in case of her remarriage; to Harold Jensen, son of the deceased, at the rate of \$1.96 per week, and to Evelyn Jensen, daughter of the deceased, at the rate of \$1.96 per week until the said Harold Jensen and Evelyn Jensen, respectively, shall arrive at the age of eighteen years, and the sum of One hundred (\$100) Dollars for funeral expenses, and said appeal having come on to be heard in this Court and having been argued by Norman B. Beecher, Esq., of counsel for the appellant and E. C. Aiken, Deputy Attorney-General for the Workmen's Compensation Commission, and due deliberation having been had thereon,

Now, on motion of Egbert E. Woodbury, Attorney-General, for the Workmen's Compensation Commission, it is

Ordered, that the award or decision of the Workmen's Compensation Commission appealed from be and the same hereby is in all respects affirmed.

JOSEPH H. HOLLANDS, *Clerk*.

20

Order of Commission Affirming Award.

Before the State Workmen's Compensation Commission.

In the Matter of the Claim of MARIE JENSEN, Claimant-Respondent, for Compensation to Herself and Children under the Workmen's Compensation Law for the Death of Christen Jensen,
against

SOUTHERN PACIFIC COMPANY, Employer and Self-insurer, Appellant.

Whereas, the Southern Pacific Company having appealed to the Appellate Division of the Supreme Court, Third Department, from the award and decision of the Workmen's Compensation Commission made October 9, 1914, allowing compensation to the above named Marie Jensen, widow of Christen Jensen, for the death of the said Christen Jensen, at the rate of \$5.87 per week, and to the two children of said deceased at the rate of \$1.96 each per week, together with the sum of \$100.00 for funeral expenses, to be paid to Marie Jensen; said appeal having been heard by said Appellate Division of the Supreme Court, and the said Appellate Division of the Supreme Court at a term commencing March 2nd, 1915, having duly affirmed the award and decision of the Workmen's Compensation Commission, by an order duly filed with the Clerk of the Appellate

21 Division on the 22nd day of March, 1915; and the papers on appeal herein, together with a certified copy of said order of the Appellate Division, having been remitted to the Workmen's Compensation Commission and having been duly filed in the office of the Commission.

Ordered, that the order of the Appellate Division be, and the same hereby is made the order of the Workmen's Compensation Commission, and further ordered that the award of compensation made herein, October 9, 1914, be and the same hereby is affirmed.

Dated, March 23, 1915.

F. A. SPENCER, *Secretary*.

Notice of Appeal to Court of Appeals.

Supreme Court, Appellate Division, Third Department.

the Matter of the Claim of MARIE JENSEN, Widow, and HAROLD Jensen and Evelyn Jensen, Children of Christen Jensen, Deceased, for Compensation under the Workmen's Compensation Law; Southern Pacific Company, Employer and Self-insurer, Appellant.

Sirs: Please take notice that the Southern Pacific Company hereby appeals to the Court of Appeals from the order of the State Workmen's Compensation Commission entered in the office of said Commission on March 23, 1915, affirming an award made herein on October 9, 1914, and from the order of the Appellate Division of the Supreme Court, Third Department, affirming said award and entered in the office of said Appellate Division on March 22, 1915, and from said award made herein on October 9, 1914.

Dated, New York, April 2, 1915.

Yours, etc.,

BURLINGHAM, MONTGOMERY & BEECHER,

Attorneys for Southern Pacific Company.

Office and Post Office Address, 27 William Street, Borough of Manhattan, New York City.

To:

Clerk of the Court of Appeals.

Clerk of Appellate Division, Third Department.

Egbert E. Woodbury, Esq., Attorney-General.

State Workmen's Compensation Commission.

Jeremiah F. Conner, Esq., Counsel, State Workmen's Compensation Commission.

Marie Jensen, Claimant, 103 Le Roy Street, New York City.

Stipulation Waiving Certification.

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal to the Court of Appeals, the order of affirmance of the Appellate Division, Third Department, the order of affirmance of the State Workmen's Compensation Commission entered upon said order, and all the papers upon which said Appellate Division acted in making its order affirming the award of the State Workmen's Compensation Commission herein, as the same are now on file in the office of the Secretary of the State Workmen's Compensation Commission.

Certification thereof is hereby waived.

Dated, New York, April 20, 1915.

BURLINGHAM, MONTGOMERY &
BEECHER,

Attorneys for Appellant.

EGBERT E. WOODBURY,

Attorney General.

JEREMIAH F. CONNOR,

Counsel State Workmen's Compensation Commission.

LAWRENCE K. BROWN,

Att'y for Marie Jensen.

Affidavit of No Opinion.

Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of MARIE JENSEN, Widow, and HAROLD Jensen and Evelyn Jensen, Children of Christen Jensen, Deceased, for Compensation under the Workmen's Compensation Law; Southern Pacific Company, Employer and Self-insurer, Appellant,

STATE OF NEW YORK,

County of New York, ss:

Ray Rood Allen, being duly sworn, deposes and says: that he is an attorney in the office of Burlingham, Montgomery & Beecher, attorneys for the appellant, and is familiar with this appeal. No opinion was handed down by the Appellate Division of the Supreme Court, Third Department, upon the decision of this appeal.

RAY ROOD ALLEN.

Sworn to before me this 19 day of April, 1915.

ROSCOE H. HUPPER,

Notary Public, New York County, No. 1621.

Form 6.

Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 13th day of July, in the year of our Lord one thousand nine hundred and fifteen, before the Judges of said Court.

Witness, The Hon. Willard Bartlett, Chief Judge, presiding.

R. M. BARBER, *Clerk.*

Remittitur, July 14th, 1915.

In the Matter of the Claim of MARIE JENSEN, &c.,

Respondent,

ag'st

SOUTHERN PACIFIC COMPANY, Employer, &c., Appellant.

Be it Remembered, That on the 21st day of April, in the year of our Lord one thousand nine hundred and fifteen, Southern Pacific Company, the appellant in this Proceeding, came here into the Court of Appeals, by Burlingham, Montgomery & Beecher, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Marie Jensen, the respondent in said proceeding, afterwards appeared in said Court of Appeals by Egburt E. Woodbury, Attorney-General,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Norman B. Beecher, of counsel for the appellant, and by Mr. E. C. Aiken, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

Therefore, It is considered that the said Order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, etc.

R. M. BARBER,

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, July 14th, 1915.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

STATE OF NEW YORK,

Court of Appeals, State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Marie Jensen v. Southern Pacific Company decided by the Court of Appeals on the 13th day of July 1915, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 25th day of October, 1915.

[Seal Court of Appeals, State of New York.]

J. NEWTON FIERO,

*As Reporter of the Court of Appeals
of the State of New York.*

Attest:

[L. s.] R. M. BARBER,

Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Willard Bartlett, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Marie Jensen v. Southern Pacific Company decided by the said Court of Appeals on the 13th day of July, 1915, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 25th day of October in the year of one thousand nine hundred and fifteen.

WILLARD BARTLETT,

*As Chief Judge of the Court of Appeals
of the State of New York.*

30 In the Matter of the Claim of MARIE JENSEN, Claimant, Respondent, for Compensation under the Workmen's Compensation Law,

v.

SOUTHERN PACIFIC COMPANY, Employer and Self-Insurer, Appellant.

(Decided July 13, 1915.)

Appeal from an Order of the Appellate Division Affirming an Award of the Workmen's Compensation Commission.

Norman B. Beecher for appellant.

Egburt E. Woodbury, Attorney-General (E. C. Aiken of counsel), for respondent.

Visscher, Whalen & Austin filed brief for New York Central Railroad Company, as amici curiæ.

MILLER, J.:

The claimant's husband was killed on August 15th, 1914, while employed in unloading the steamship El Oriente which was berthed

alongside a pier in the Hudson river. When the accident occurred he was moving an electric truck upon a gangway connecting the vessel with the pier. The appellant, a corporation of the state of Kentucky, is a common carrier by railroad. It also owned and operated said steamship, which plied between New York and Galveston, Texas. It does not appear that the steamship was in any way operated in connection with a line of railroad, and in its report of the accident the appellant stated its business to be "transportation by steamships engaged solely in interstate commerce." We are required on this appeal, first, to construe the Workmen's Compensation Law (Chap. 67 of the Consolidated Laws; L. 1914, ch. 41) in so far as it relates to this case, and, second, to determine its constitutional validity. The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums paid by employers based on the payroll, the number of employees and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the commission of his own financial ability to pay. If he does neither he is liable to a penalty equal to the pro rata premium payable to the state fund during the period of his non-compliance and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk and negligence of a fellow-servant. By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or results solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits but in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power. Thus the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risks involved. So much for the general outline of the scheme against whose justice or economic soundness nothing, that occurs to me, can be said.

The particular provisions requiring construction are the following:
 "SECTION 2. Application. Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: * * *
 "Group 8. The operation, within or without the state, including

repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company. * * *

"Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage."

"SECTION 114. Interstate Commerce. The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

It is claimed that loading and unloading are included in "operation" and that, therefore, the case falls within group 8, which excepts vessels of other states or countries used in interstate
 32 or foreign commerce, but the specific enumeration of longshore work in group 10 excludes such work from the other group.

It is next claimed that the statute was not intended to apply to employment in interstate or foreign commerce and that in case of doubt that construction should be adopted, for otherwise it would offend against the commerce clause of the Federal Constitution by imposing a burden upon such commerce. The latter claim will be noticed first. The statute does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relations between employers and employees in this state. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until congress by entering the field excludes state action. (*Sherlock v. Alling*, 93 U. S. 99; *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455; *Reid v. Colorado*, 187 U. S. 137; *Simpson v. Shepard*, 230 U. S. 352; *Erie R. R. Co. v. Williams*, 233 U. S. 685.)

Literally construed, section 114 makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce. But, though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause "for whom a rule of liability or method of compensation has been or may be established by the congress of the United States" is meaningless. The legislature evidently intended to regulate, as far as it had the power, all employments within the state of the kinds enumerated

The earlier sections are in terms of general application, and section 114, which is headed "Interstate Commerce," is one of limitation, not of definition. Its obvious purpose was to guard against a construction violative of the Constitution of the United States, and so it provided that the act should apply to interstate or foreign commerce, "for whom a rule of liability or method of compensation has been or may be established by the congress of the United States," only to the extent that intrastate work affected may or shall be clearly separable or distinguishable therefrom. In other words, the legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the congress of the United States. But it is said that congress may at any time regulate employments in interstate or foreign commerce, and that the case is one in which a rule "may be established," etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words "may be" should be construed in the sense of "shall be."

33 One other question in respect of the application of the act remains to be considered. It is said that the appellant is a carrier by railroad, and that, therefore, the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65), prescribes the rule governing the employment in which the deceased was engaged. As far as this case is concerned the appellant is a carrier by water. Its business is transportation by steamships, which, as far as appears, may not even indirectly be related to transportation by railroad, certainly not by any particular line of railroad. It is significant that the earlier Federal statute of June 11, 1906 (34 Stat. L. 232), applied to "every common carrier" engaged in interstate or foreign commerce, whilst the present act applies only to carriers by railroad. There is nothing in the act indicative of a purpose to apply it to carriage by water, if it happened to be conducted by a railroad corporation, and not otherwise—to apply one rule of liability to transportation by a steamship line, if owned and operated by a railroad corporation, and a different rule to precisely similar transportation not thus controlled. The Federal act provides a rule of liability of carriers by railroad for injury or death "resulting in whole or in part * * * by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." The words "boats" and "wharves" may be given due effect by applying them to adjuncts or auxiliaries to transportation by railroad.

Our conclusion, therefore, is that the employment in which the deceased was engaged was not governed by the Federal statute, that the Workmen's Compensation Act applied to it, and that the latter act is not violative of the Federal Constitution for attempting directly to regulate or impose a tax or burden on interstate or foreign commerce. We now come to perhaps the most important question in the case. Does the act violate the Fourteenth Amendment to the Constitution of the United States for taking property without due process of law?

Much reliance is placed on the decision of this court in *Ives v. South Buffalo Ry. Co.* (201 N. Y. 271, 294). In that case Judge Werner, referring to the appeal on economic and sociologic grounds and speaking for the court, said: "We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts." That decision was made in March, 1911. Following that suggestion, the legislature provided in the orderly way prescribed by the Constitution for the submission to the people of a proposed constitutional amendment and in due time that amendment was adopted on November 4th, 1913, and became section 19 of article 1 of our State Constitution. It is unnecessary to set
34 that amendment forth in extenso, but it suffices to say that so far as the due process clause or any other provision of our State Constitution is concerned the amendment amply sustains the act. However, it is urged that the reasons which constrained the court to declare the act involved in the *Ives* case unconstitutional are equally cogent when applied to the Fourteenth Amendment. In the first place it is to be observed that the two acts are essentially and fundamentally different. That involved in the *Ives* case made the employer liable in a suit for damages though without even imputable fault and regardless of the fault of the injured employee short of serious and willful misconduct. This act protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation in all cases and from the certainty of defeat if unable to establish a case of actionable negligence. Both acts are said to have been based on the proposition that the risk of accidental injuries in a hazardous employment should be borne by the business and that loss should not fall on the injured employee and his dependents, who are unable to bear it or to protect themselves against it. That act made no attempt to distribute the burden, but subjected the employer to a suit for damages. This act does in fact as well as in theory distribute the burden equitably over the industries affected. It allows compensation only for loss of earning power, but by the creation of a state insurance fund, or by the substitute methods provided, it insures the prompt receipt by the injured employee or his dependents of a certain sum undiminished by the expenses of litigation. The two acts are, therefore, so plainly dissimilar that the decision in the *Ives* case is not controlling in this.

Moreover, upon the question whether an act offends against the Constitution of the United States the decisions of the United States Supreme Court are controlling. The only one of the numerous Workmen's Compensation Acts which appears to have been directly passed on by the United States Supreme Court is the act of Ohio, which contained an optional clause. (*Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571). The single question decided in that case was that limiting the application of the act to shops with five or more employees did not result in arbitrary and unreasonable classification. This act is compulsory. The employer is subjected to a penalty for not adopting one of the three methods of insurance allowed him, and

the employee has no choice at all except possibly as to whether he will enter one of the classified employments. However, except for a feature presently to be considered, the decision in *Noble State Bank v. Haskell* (219 U. S. 104) is decisive. Indeed, upon close analysis

35 it will appear that the taking justified in that case as a proper exercise of the police power was no more in the public interest than that involved in this case and that the mutual benefits to the parties immediately concerned were not as direct. In that case an act of the state of Oklahoma requiring every bank existing under the state laws to pay an assessment based on average daily deposits into a guaranty fund to secure the full repayment of deposits in case any such bank became insolvent was sustained not merely under the reserve power of the state to alter or repeal charters but as a proper exercise of the police power. Solvent banks were thus required to pay money into a fund for the direct benefit of others, the banks benefitting only indirectly from the supposed benefit to commerce and the greater stability of banking. In this case the mutual benefits are direct. Granted, that employers are compelled to insure and that there is in that sense a taking. They insure themselves and their employees from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking no doubt disappears in a practical experience. As a matter of fact every industrial concern, except the very large ones who insure themselves, have for some time been forced by conditions, not by law, to carry accident indemnity insurance. A relatively small part of the sums thus paid actually reached injured workmen or their dependents. With the economic saving of the present scheme, insurance in the long run should certainly be as cheap as under the old wasteful plan, and the families of all injured workman, not a part only, will receive some compensation for the loss of earning power of the wage earner. We should consider practical experience as well as theory in deciding whether a given plan in fact constitutes a taking of property in violation of the Constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss.

But for the matter now to be considered we need not look farther for a case controlling upon us and in principle decisive of this. Whilst the *Noble State Bank* case was referred to in the *Ives* case, it was not controlling for the reason that the State Constitution was involved and it was not in point as an authority because of the essential differences in the act then before the court, already pointed out.

A point was made on oral argument that the act was unconstitutional for depriving an employee injured by negligence imputable to the employer of a right of action for the wrong. Of course, the employer cannot be heard to urge the grievance of the employee (Jeffrey Mfg. Co. v. Blagg, *supra*), but exemption from further liability upon paying the required premium into the state fund is an essential element of the scheme, and if the

36

act be unconstitutional as to the employee the employer would be deprived of that exemption and thus would be directly affected by the unconstitutionality of the act in that respect. It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees.

Moreover, the act does not deal with intentional wrongs but only with accidental injuries, and no account is taken of the presence or absence of negligence attributable to the employer. In the way modern undertakings are conducted it is rarely possible to trace personal fault to the employer, but he has been held liable for wrongs of others under the doctrine of respondeat superior. That doctrine has been developed by the courts to make the principal accountable for the conduct of his affairs, though it must be remembered that it does not rest on the doctrine of agency. No one has a vested right under the Constitution to the maintenance of that common-law doctrine, which undoubtedly may be extended or curtailed by the legislature. No one doubts that the doctrine of assumption of risk and the fellow-servant doctrine, also developed by the courts under different conditions than those now prevailing, may be limited or entirely abrogated by the legislature. Acts having that effect have been sustained by repeated decisions of this court. The power to limit or take away must also involve the power to extend. At the common law the servant was held to assume by implied contract the ordinary risks of the employment, including the risk of a fellow-servant's negligence, and even of negligence imputable to the master if the danger was obvious, or with knowledge of it the servant voluntarily continued in the employment. It would not be a great extension of that doctrine for the legislature to provide that the employee should assume the risk of all accidental injuries, and if that can be done, it is certainly competent for the legislature to provide by the creation of an insurance fund for a limited compensation to the employee for all accidental injuries, regardless of whether there was a cause of action for them at common law.

This subject should be viewed in the light of modern conditions, not those under which the common-law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the em-

ployee, and sometimes to both. Surely it is competent for the state in the promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. Any plan devised by the wit of man may in exceptional cases work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it. Fortunately the courts have not attempted to define the limits of the police power. Its elasticity makes progress possible under a written constitution guaranteeing individual rights. The question is often one of degree. The act now before us seems to be fundamentally fair to both employer and employee. Of course, I do not speak of details, which may or may not be open to criticism, but which, granting the validity of the underlying principle, are plainly within the province of the legislature. It is not open to the objections found to be fatal to the act considered in the Ives case. It is plainly justified by the amendment to our own State Constitution and the decisions of the United States Supreme Court, notably in the Noble State Bank case, make it reasonably certain that it will be found by that court not to be violative of the Constitution of the United States.

The order of the Appellate Division should be affirmed, with costs. Willard Bartlett, Ch. J., Collin, Cuddeback, Cardozo and Seabury, JJ., concur; Werner, J., not sitting.

Order affirmed.

[Endorsed:] Matter of Jensen. Miller, J.

38 At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department Held at the City Hall in the City of Saratoga Springs, N. Y., on the 14th Day of September, 1915.

Present:

Hon. Walter Lloyd Smith, Presiding Justice.

Hon. John M. Kellogg,

Hon. George F. Lyon,

Hon. Wesley O. Howard,

Hon. John Woodward,

Associate Justices.

In the Matter of the Claim of MARIE JENSEN, Claimant-Respondent,
for Compensation under the Workmen's Compensation Law,
against

SOUTHERN PACIFIC COMPANY, Employer and Self-insurer, Appellant.

The above named Southern Pacific Company having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, made at a Term commencing on the 2nd day of March, 1915, which affirmed an award of the Workmen's Compensation Commission entered in the office of said Commission on the 9th day of October, 1914, whereby compensation

was awarded to the above named Marie Jensen at the rate of \$5.87 weekly during her widowhood with two years' compensation in one sum in case of her remarriage; to Harold Jensen, son of the deceased, at the rate of \$1.96 per week, and to Evelyn Jensen, daughter of the deceased, at the rate of \$1.96 per week until the said Harold Jensen and Evelyn Jensen, respectively, shall arrive at the age of eighteen years, and the sum of One Hundred (\$100) Dol-

39 lars for funeral expenses; and said appeal having been argued in the Court of Appeals by Norman B. Beecher, Esq., of Counsel for the appellant, and E. C. Aiken, Deputy Attorney General, of counsel for the Workmen's Compensation Commission, and the Court of Appeals, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs, and further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law; and the said remittitur having been filed in this court.

Now, on motion of E. E. Woodbury, Attorney General, Attorney for the State Industrial Commission, formerly the Workmen's Compensation Commission, it is

Ordered that the order and judgment of the Court of Appeals be and the same is hereby made the order of this Court, and that the award or decision of the Workmen's Compensation Commission entered on the 9th day of October, 1914, be and the same is hereby in all respects affirmed with \$162.40 costs to be paid by the appellant.

JOSEPH H. HOLLANDS, *Clerk.*

40 [Endorsed:] Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of Marie Jensen for Compensation under the Workmen's Compensation Law, against Southern Pacific Company, Employer and Self-Insurer. Copy. Order Affirming Order. Egbert E. Woodbury, Attorney-General, Attorney for ———, Capitol, Albany, N. Y.

41 New York Court of Appeals.

SOUTHERN PACIFIC COMPANY, Plaintiff-in-Error,
against
MARIE JENSEN, Defendant-in-Error.

Application for Writ of Error.

To the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals:

The petition of Southern Pacific Company respectfully shows

On August 15, 1914, Christen Jensen received injuries which resulted in his death, and thereafter a claim for compensation under the Workmen's Compensation Law was filed with the New York State Workmen's Compensation Commission by Jensen's widow

defendant-in-error. Jensen was injured while in the employ of your petitioner, a Kentucky corporation. At the time of the accident Jensen was driving an electric truck. In driving the truck through a port in the side of the vessel his head struck your petitioner's vessel *El Oriente*, then lying in the Hudson River. Jensen was engaged in unloading cargo from said vessel, which cargo had been brought to the State of New York from other States. Your petitioner was a common carrier by railroad. Your petitioner's business in this State consists solely in carrying passengers and merchandise between New York and other states, and Jensen's work consisted solely in moving cargo destined to or from other states.

42 Your petitioner objected to the making of an award on various grounds set out in the record and set out in the assignments of error made in connection with this application for a writ of error. The Commission, however, on October 9, 1914, made an award of compensation claiming to act under the Workmen's Compensation Law of the State of New York, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41.

From said award your petitioner appealed to the Appellate Division of the Supreme Court, Third Judicial Department, and said Appellate Division affirmed said award. Thereupon your petitioner appealed from said order to the New York Court of Appeals, which is the highest Court in the State of New York, and said Court of Appeals adjudged that said order of said Appellate Division should be affirmed and it remitted the record with its said judgment to the said Appellate Division, which thereupon made said judgment of the Court of Appeals the judgment of said Appellate Division. Said record is now with said Appellate Division.

Inasmuch as certain errors appear in the judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignments of error, your petitioner prays for the allowance of a writ of error, returnable to the Supreme Court of the United States, and a citation.

And so it will ever pray, etc.

Dated, October 8, 1915.

SOUTHERN PACIFIC COMPANY,
By BURLINGHAM, MONTGOMERY &
BEECHER, *Its Attorneys.*

CHARLES C. BURLINGHAM, *Counsel.*

43 [Endorsed:] Clerk's Index No. —, 191—. New York Court of Appeals. Southern Pacific Company, Plaintiff-in-Error, vs. Marie Jensen, Defendant-in-Error. Application for Writ of Error. Burlingham, Montgomery & Beecher, Attorneys for Plaintiff-in-Error, 27 William Street, Borough of Manhattan, New York City. Service of within is hereby admitted, this 20th day of October, 1915. E. E. Woodbury, Att'y General. Lawrence Brown, Attorney for defendant in error. Jeremiah F. Connor, Counsel State Workmen's Compensation Commission.

44

Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY, Plaintiff-in-Error,
 against
 MARIE JENSEN, Defendant-in-Error.

Assignments of Error by Plaintiff in Error.

And now comes Southern Pacific Company, plaintiff-in-error in the above entitled matter, and in connection with its application for a writ of error makes its assignments of error:

1. The Court erred in deciding that the Workmen's Compensation Law of New York, L. 1913, ch. 816, as re-enacted by L. 1914, ch. 41, was not unconstitutional, in that it takes plaintiff in error's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, whereby was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution of the United States and the decision was against the right, privilege or immunity especially set up or claimed under such Constitution.

2. The Court erred in deciding that the Workmen's Compensation Law, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41, was not unconstitutional, in that it constitutes a regulation of and a burden upon commerce among the several states in violation of Article 1, Sec. 8, of the Constitution of the United States, and in violation of the Federal Employers' Liability Act of April 22, 1908, (35 Stat. L. 65), whereby was drawn in question the validity of a statute of or an authority exercised under the State of New York on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity especially set up or claimed under such Constitution and statutes.

3. The Court erred in deciding that the Workmen's Compensation Law, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41, was not unconstitutional, in that it denies the plaintiff in error the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States because said law does not afford an exclusive remedy, but leaves the plaintiff in error and its vessels subject to suit in admiralty, whereby was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or im-

munity especially set up or claimed under such Constitution or statutes.

4. The Court erred in deciding that the Workmen's Compensation Law, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41, was not unconstitutional, in that it violates Article 3, Sec. 2, of the Constitution of the United States conferring admiralty jurisdiction upon the Courts of the United States, whereby was drawn in question the validity of a statute of or an authority exercised under the United States, and the decision was against their validity, and therein was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity especially set up or claimed under such Constitution or statutes.

5. The Court erred in not rendering judgment in favor of the plaintiff in error, because said Workmen's Compensation Law, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41, as applied to this plaintiff in error is unconstitutional and void and in conflict with and in violation of Article 1, sec. 8, Article 3, Sec. 2, and the Fourteenth Amendment of the Constitution of the United States, and the Federal Employers' Liability Act of April 22, 1908, (35 Stat. L. 65), whereby was drawn in question the validity of a statute of or an authority exercised under the United States, and the decision was against their validity; and therein was drawn in question the validity of a statute — or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity especially set up or claimed under such Constitution or statutes.

6. The Court erred in not holding that the Federal Employers' Liability Act of April 22, 1908, (35 Stat. L. 65) governed the question of liability for Jensen's death to the exclusion of the State Workmen's Compensation Law, and thereby was drawn in question the validity of a statute of or an authority exercised under the United States, and the decision was against their validity; and therein was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity especially set up or claimed under such Constitution or statutes.

Dated, New York, October 8, 1915.

CHARLES C. BURLINGHAM,
Attorney for Southern Pacific Co.

48 [Endorsed:] Supreme Court of the United States. Southern Pacific Company, Plaintiff-in-Error, vs. Marie Jensen, Defendant-in-Error. Assignments of Error. Burlingham, Montgomery & Beecher, Attorneys for Pl'tf-in-Error, 27 William Street, Borough of Manhattan, New York City. Service of within is hereby admitted, this 20th day of October 1915. E. E. Woodbury, Att'y General; Lawrence Brown, Attorney for def't in error; Jeremiah F. Connor, Counsel State Workmen's Compensation Commission.

49 Supreme Court of the United States.
SOUTHERN PACIFIC COMPANY, Plaintiff-in-Error,
against
MARIE JENSEN, Defendant-in-Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

Now comes the above named plaintiff in error, and in connection with its writ of error issued by this Court to the Appellate Division of the Supreme Court of the State of New York, Third Department, it prays for a reversal of the judgment against it of said Appellate Division affirming an award of the State Workmen's Compensation Commission, entered in the office of said Court on March 2, 1915, and it also prays for a reversal of the judgment of affirmance entered in the office of said Court on September 14, 1915, upon the order or judgment of the Court of Appeals, and for a reversal of the judgment of the Court of Appeals affirming said judgments or orders.

CHARLES C. BURLINGHAM,

Attorney for Southern Pacific Co., Plaintiff-in-Error.

50 [Endorsed:] Supreme Court of the United States. Southern Pacific Company, Plaintiff-in-Error, vs. Marie Jensen, Defendant-in-Error. Prayer for Reversal. Burlingham, Montgomery & Beecher Attorneys for Pl'tf-in-Error, 27 William Street, Borough of Manhattan, New York City. Service of within is hereby admitted, this 20th day of October, 1915. E. E. Woodbury, Att'y General. Lawrence K. Brown, Attorney for def't in Error. Jeremiah F. Connor, Counsel, State Workmen's Compensation Commission.

51 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Appellate Division, Third Department, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court, Appellate Division, on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest

part of law or equity of the said state in which decision could be had in the said suit between Marie Jensen, plaintiff, and Southern Pacific Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was a favor of their validity, or wherein was drawn in question the constitution of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such clause of the said Constitution, statute, treaty or commission; a manifest error had happened to the great damage of the said defendant, as is said and appears by its complaint. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 16 day of October, in the year of our Lord One thousand nine hundred and fifteen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
*Clerk of the United States District Court,
 Southern District of New York.*

The above writ is allowed by—

WILLARD BARTLETT,
Chief Judge of the New York Court of Appeals.

[Endorsed:] Supreme Court of the United States, Southern Pacific Company, Plaintiff-in-Error, vs. Marie Jensen, Defendant-in-Error. Writ of Error. Burlingham, Montgomery & Beecher, Attorneys for Plff-in-Error, 27 William Street, Borough of Manhattan, New York City. Service of within is hereby admitted, this 20th day of October, 1915. Lawrence K. Brown, Attorney for Def't in Error. Jeremiah F. Connor, Counsel, State Workmen's Compensation Commission.

- 54 United States of America and the State Industrial Commission to Marie Jensen, Defendants-in-Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York, Appellate Division, Third Department, wherein Southern Pacific Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals, this 16th day of October, in the year of our Lord, One thousand nine hundred and fifteen.

[Seal Court of Appeals, State of New York.]

WILLARD BARTLETT,

Chief Judge of the New York Court of Appeals.

- 55 [Endorsed:] 80731½ 39/107. Supreme Court of the United States. Southern Pacific Company, Plaintiff-in-Error, vs. Marie Jensen, Defendant-in-Error. Citation. Burlington, Montgomery & Beecher, Attorneys for Plff-in-Error, 27 William Street, Borough of Manhattan, New York City. Service of within is hereby admitted, this 20th day of October, 1915. E. E. Woodbury, Att'y General. Lawrence K. Brown, Attorney for Defendant. Jeremiah F. Connor, Counsel. State Workmen's Compensation Commission. Entered in Docket Oct. 22, 1915.

- 56 Court of Appeals of the State of New York.

SOUTHERN PACIFIC COMPANY, Plaintiff-in-Error,
against
MARIE JENSEN, Defendant-in-Error.

Know all men by these presents, That the National Surety Company, a Corporation organized and existing under the laws of the State of New York, having an office and principal place of business at No. 115 Broadway, New York, New York, is held and firmly bound unto the above named Marie Jensen, in the sum of Five Hundred (\$500.00) Dollars, to be paid to the said Marie Jensen, her heirs, administrators and assigns, to which payment well and truly to be made the said National Surety Company binds itself, its successors and assigns firmly by these presents.

Signed and sealed with the Corporate seal this 5th day of October, 1915.

Whereas, the above named Southern Pacific Company has prosecuted a writ of error to the United States Supreme Court to reverse a certain judgment rendered in the above entitled action by the

Court of Appeals of the State of New York and entered in the Appellate Division of the Supreme Court of said State, Third Department.

Now, therefore, the condition of the above obligation is such, that if the said Southern Pacific Company shall prosecute its writ of error to effect and answer all costs if it fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice President.

Attest:

E. M. MCCARTHY,
Resident Assistant Secretary.

57 STATE OF NEW YORK,
County of New York, ss:

On this 5th day of October, 1915, before me personally appeared Wm. A. Thompson, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said Wm. A. Thompson further said that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said E. M. McCarthy subscribed to the said instrument is in the genuine handwriting of the said E. M. McCarthy and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

H. E. EMMETT,
Notary Public.

Copy of By-Law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

Section 1, Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, Vice-President, a Resident Vice-President, or Attorney-in-fact and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "seal" or the letters "L. S." opposite the signature of such Attorneys-in-Fact, as the case may be.

COUNTY OF NEW YORK,
State of New York, ss:

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company, in the County of New York, this 5th day of October, 1915.

E. M. McCARTHY,
Resident Assistant Secretary.

58 STATE OF NEW YORK,
County of Albany, ss:

I, Joseph H. Hollands, Clerk of the Supreme Court of the State of New York, Appellate Division, Third Department, pursuant to a writ of error directed to the Honorable the Judges of the said Appellate Division, Third Department, which said writ was allowed by the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals, and signed by the Clerk of the United States District Court for the Southern District of New York on October —, 1915, do hereby certify the writing hereto annexed to be a true, complete and perfect copy of the record of assignments of error and of all proceedings in the case of Marie Jensen, claimant-respondent, against Southern Pacific Company, defendant-appellant, as fully as the same remain on file and of record in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Court this 26th day of October, 1915.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS, *Clerk*.

59 [Endorsed:] Clerk's Index No. —. —, 191—. Supreme Court of the United States. Southern Pacific Company, Plaintiff-in-Error, vs. Marie Jensen, Defendant-in-Error. Clerk's Return. Burlingham, Montgomery & Beecher, Attorneys for Plff-in-Error, 27 William Street, Borough of Manhattan, New York City. Due service of within — is hereby admitted, this — day of —, 191—. — —, Attorney for —.

Endorsed on cover: File No. 24,983. New York Supreme Court, Appellate Division, Third Department. Term No. 700. Southern Pacific Company, plaintiff in error, vs. Marie Jensen. Filed November 9th, 1915. File No. 24,983.



WORKMEN'S COMPENSATION LAW.

CHAP. 67 OF THE CONSOLIDATED LAWS.

Being Chap. 816, Laws 1913, as re-enacted and amended by Chap. 41, Laws 1914, and amended by Chap. 316, Laws 1914.

Chapters 41 and 316.

AN ACT to re-enact and amend the workmen's compensation law.

Chapter 41 became a law March 16, 1914, with the approval of the Governor.

Chapter 316 became a law April 14, 1914, with the approval of the Governor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," is hereby re-enacted and amended to read as follows:

CHAPTER 67 OF THE CONSOLIDATED LAWS.

Workmen's Compensation Law.

- Article 1. Short title, application, definitions. (§§ 1-3).
 2. Compensation. (§§ 10-34).
 3. Security for compensation. (§§ 50-54).
 4. State workmen's compensation commission. (§§ 60-76).
 5. State insurance fund. (§§ 90-105).
 6. Miscellaneous provisions. (§§ 110-119).
 7. Laws repealed; when to take effect. (§§ 130-131).

ARTICLE 1.

Short Title; Application; Definitions.

- Section 1. Short title.
 2. Application.
 3. Definitions.

Section 1. **Short title.** This chapter shall be known as the "workmen's compensation law."

§ 2. **Application.** Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains.

Group 2. Construction and operation of railways not included in group one.

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purposes of any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

Group 4. The operation, including construction and repair, of car shops, machine shops, steam and power plants, not included in group three.

Group 5. The operation, including construction and repair, of telephone lines and wires for the purposes of the business of a telephone company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 6. The operation, including construction and repair, of telegraph lines and wires for the purposes of the business of a telegraph company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 7. Construction of telegraph and telephone lines not included in groups five and six.

Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company.

Group 9. Shipbuilding, including construction and repair in a ship-yard or elsewhere, not included in group eight.

Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.

Group 11. Dredging, subaqueous or caisson construction, and pile driving.

Group 12. Construction, installation or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines.

Group 13. Paving; sewer and subway construction, work under compressed air, excavation, tunneling and shaft sinking, well digging, laying and repair of underground pipes, cables and wires, not included in other groups.

Group 14. Lumbering; logging, river-driving, rafting, booming, saw mills, shingle mills, lath mills; manufacture of veneer and of excelsior; manufacture of staves, spokes, or headings.

Group 15. Pulp and paper mills.

Group 16. Manufacture of furniture, interior woodwork, organs, pianos, piano actions, canoes, small boats, coffins, wicker and rattan ware; upholstering; manufacture of mattresses or bed springs.

Group 17. Planing mills, sash and door factories, manufacture of wooden and corrugated paper boxes, cheese boxes, mouldings, window and door screens, window shades, carpet sweepers, wooden toys, articles and wares or baskets.

Group 18. Mining; reduction of ores and smelting; preparation of metals or minerals.

Group 19. Quarries; sand, shale, clay or gravel pits, lime kilns; manufacture of brick, tile, terra-cotta, fire-proofing, or paving blocks, manufacture of calcium carbide, cement, asphalt or paving material.

Group 20. Manufacture of glass, glass products, glassware, porcelain or pottery.

Group 21. Iron, steel or metal foundries; rolling mills; manufacture of castings, forgings, heavy engines, locomotives, machinery, safes, anchors, cables, rails, shafting, wires, tubing, pipes, sheet metal, boilers, furnaces, stoves, structural steel, iron or metal.

Group 22. Operation and repair of stationary engines and boilers, not included in other groups.

Group 23. Manufacture of small castings or forgings, metal wares, instruments, utensils and articles, hardware, nails, wire goods, screens, bolts, metal beds, sanitary, water, gas or electric fixtures, light machines, typewriters, cash registers, adding machines, carriage mountings, bicycles, metal toys, tools, cutlery, instruments, photographic cameras and supplies, sheet metal products, buttons.

Group 24. Manufacture of agricultural implements, threshing machines, traction engines, wagons, carriages, sleighs, vehicles, automobiles, motor trucks, toy wagons, sleighs or baby carriages.

Group 25. Manufacture of explosives and dangerous chemicals, corrosive acids or salts, ammonia, gasoline, petroleum, petroleum products, celluloid, gas, charcoal, artificial ice, gun powder or ammunition.

Group 26. Manufacture of paint, color, varnish, oil, japans, turpentine, printing ink, printers' rollers, tar, tarred, pitched or asphalted paper.

Group 27. Distilleries, breweries; manufacture of spirituous or malt liquors, alcohol, wine, mineral water or soda waters.

Group 28. Manufacture of drugs and chemicals, not specified in group twenty-five, medicines, dyes, extracts, pharmaceutical or toilet preparations, soaps, candles, perfumes, non-corrosive acids or chemical preparations, fertilizers, including garbage disposal plants; shoe blacking or polish.

Group 29. Milling; manufacture of cereals or cattle foods, warehousing; storage; operation of grain elevators.

Group 30. Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue.

Group 31. Tanneries.

Group 32. Manufacture of leather goods and products, belting, saddlery, harness, trunks, valises, boots, shoes, gloves, umbrellas, rubber goods, rubber shoes, tubing, tires or hose.

Group 33. Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries.

Group 34. Bakeries, including manufacture of crackers and biscuits, manufacture of confectionery, spices or condiments.

Group 35. Manufacture of tobacco, cigars, cigarettes or tobacco products.

Group 36. Manufacture of cordage, ropes, fibre, brooms or brushes; manilla or hemp products.

Group 37. Flax mills; manufacture of textiles or fabrics, spinning, weaving and knitting manufactories; manufacture of yarn, thread, hosiery, cloth, blankets, carpets, canvas, bags, shoddy or felt.

Group 38. Manufacture of men's or women's clothing, white wear, shirts, collars, corsets, hats, caps, furs or robes.

Group 39. Power laundries; dyeing, cleaning or bleaching.

Group 40. Printing, photo-engraving, stereotyping, electrotyping, lithographing, embossing; manufacture of stationery, paper, cardboard boxes, bags, or wall-paper; and book-binding.

Group 41. The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules.

Group 42. Stone cutting or dressing; marble works; manufacture of artificial stone; steel building and bridge construction; installation of elevators, fire escapes, boilers, engines or heavy machinery; brick-laying, tile-laying, mason work, stone-setting, concrete work, plastering; and manufacture of concrete blocks; structural carpentry, painting, decorating or renovating; sheet metal work; roofing; construction, repair and demolition of buildings and bridges; plumbing, sanitary or heating engineering; installation and covering of pipes or boilers.

§ 3. **Definitions.** As used in this chapter, 1. "Hazardous employment" means a work or occupation described in section two of this chapter.

2. "Commission" means the state workmen's compensation commission, as constituted by this chapter.

3. "Employer," except when otherwise expressly stated, means

erson, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof. (*Thus amended by ap. 316, Laws 1914; in effect April 14, 1914.*)

4. "Employee" means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants.

5. "Employment" includes employment only in a trade, business occupation carried on by the employer for pecuniary gain.

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

7. "Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

8. "Death" when mentioned as a basis for the right to compensation means only death resulting from such injury.

9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, clothing or similar advantage received from the employer.

10. "State fund" means the state insurance fund provided for in article five of this chapter.

11. "Child" shall include a posthumous child and a child legally adopted prior to the injury of the employee.

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty.

ARTICLE 2.

Compensation.

Section 10. Liability for compensation.

11. Alternative remedy.

12. Compensation not allowed for first two weeks.

13. Treatment and care of injured employees.

14. Weekly wages basis of compensation.

15. Schedule in case of disability.

16. Death benefits.

17. Aliens.

18. Notice of injury.

19. Medical examination.

20. Determination of claims for compensation.
21. Presumptions.
22. Modification of award.
23. Appeals from the commission.
24. Costs and fees.
25. Compensation, how payable.
26. Enforcement of payment in default.
27. Depositing future payments.
28. Limitation of right to compensation.
29. Subrogation to remedies of employee.
30. Revenues or benefits from other sources not to affect compensation.
31. Agreement for contribution by employee void.
32. Waiver agreements void.
33. Assignments; exemptions.
34. Preferences.

§ 10. **Liability for compensation.** Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article in the event of the disability or death of his employee resulting from an accident or personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intent of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter.

§ 11. **Alternative remedy.** The liability prescribed by the last preceding section shall be exclusive, except that if an employer fails to secure the payment of compensation for his injured employees or their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor shall the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (*Thus amended by Chap. Laws 1914; in effect April 14, 1914.*)

§ 12. **Compensation not allowed for first two weeks.** No compensation shall be allowed for the first fourteen days of disability, except the benefits provided for in section thirteen of this chapter.

§ 13. Treatment and care of injured employees. The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury. If the employer fail to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so. All fees and other charges for such treatment and services shall be subject to regulation by the commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living.

§ 14. Weekly wages basis of compensation. Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed;

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident;

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;

5. If it be established that the injured employee was a minor when injured, and that under normal conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wages.

§ 15. **Schedule in case of disability.** The following schedule of compensation is hereby established:

1. **Total permanent disability.** In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

2. **Temporary total disability.** In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof but not in excess of three thousand five hundred dollars, except otherwise provided in this chapter.

3. **Permanent partial disability.** In case of disability of partial character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows:

Thumb. For the loss of a thumb, sixty weeks.

First finger. For the loss of a first finger, commonly called the index finger, forty-six weeks.

Second finger. For the loss of a second finger, thirty weeks.

Third finger. For the loss of a third finger, twenty-five weeks.

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

Phalange of thumb or finger. The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, thirty-eight weeks.

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks.

Phalange of toe. The loss of the first phalange of any toe shall

considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand. The loss of a hand, two hundred and forty-four weeks.

Arm. For the loss of an arm, three hundred and twelve weeks.

Foot. For the loss of a foot, two hundred and five weeks.

Leg. For the loss of a leg, two hundred and eighty-eight weeks.

Eye. For the loss of an eye, one hundred and twenty-eight weeks.

Loss of use. Permanent loss of the use of a hand, arm, foot, leg or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye.

Amputations. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section thirteen of this chapter.

Other cases. In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the commission on its own motion or upon application of any party in interest.

4. Temporary partial disability. In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. **Previous disability.** The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury.

§ 16. **Death benefit.** If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses, not exceeding one hundred dollars.
2. If there be a surviving wife (or dependent husband) and child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) and two years' compensation in one sum, upon remarriage; and if there be a surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable when he shall reach the age of eighteen years; provided that the amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages.
3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.
4. If the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be in the aggregate less than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren, brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent of the deceased if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. 1

* So in original.

no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident. (*Thus amended by Chap. 316, Laws 1914; in effect April 14, 1914.*)

§ 17. **Aliens.** Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amount as provided for residents, except that the commission may, at its option, or, upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the commission.

§ 18. **Notice of injury.** Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within ten days after disability, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing, and contain the name and address of the employee, and state in ordinary language the time, place, nature and cause of the injury, and be signed by him or by a person on his behalf or, in case of death, by any one or more of his dependents, or by a person on their behalf. It shall be given to the commission by sending it by mail, by registered letter, addressed to the commission at its office. It shall be given to the employer by delivering it to him or sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence; provided that, if the employer be a partnership then such notice may be so given to any one of the partners, and if the employer be a corporation, then such notice may be given to any agent or officer thereof upon whom legal process may be served, or any agent in charge of the business in the place where the injury occurred. The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter.

§ 19. **Medical examination.** An employee injured claiming or en-

titled to compensation under this chapter shall, if requested by the commission, submit himself for medical examination at a time, and from time to time, at a place reasonably convenient for the employee, and as may be provided by the rules of the commission. If the employee or the insurance carrier request he shall be entitled to have a physician or physicians of his own selection to be paid by him present to participate in such examination. If an employee refuse to submit himself to examination, his right to prosecute any proceeding under this chapter shall be suspended, and no compensation shall be payable, for the period of such refusal.

§ 20. **Determination of claims for compensation.** At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the commission. The commission shall have full power and authority to determine all questions in relation to the payment of claims for compensation under the provisions of this chapter. The commission shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the commission, together with a statement of its conclusions of fact and rulings of law. The commission may, before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the commission or a person specially deputed by the commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law.

§ 21. **Presumptions.** In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provisions of this chapter;
2. That sufficient notice thereof was given;
3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

l. That the injury did not result solely from the intoxication of injured employee while on duty.

§ 22. **Modification of award.** Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid.

§ 23. **Appeals from the commission.** An award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the appellate division of the supreme court of the third department. The commission may, in its discretion, where the claim for compensation was not made against the state fund, on the application of either party, certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The commission shall be deemed a party to every such appeal, and the attorney-general, without extra compensation, shall represent the commission thereon. An appeal may also be taken to the court of appeals in all cases where such an appeal would lie from a decision of an appellate division, in the same manner and subject to the same limitations as is now provided in civil actions. Otherwise such appeals shall be subject to the law and practice applicable to appeals in civil actions. Upon the final determination of such an appeal, the commission shall make an award or decision in accordance therewith.

§ 24. **Costs and fees.** If the commission or the court before which any proceedings for compensation or concerning an award of compensation have been brought, under this chapter, determines that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceeding upon the party who has so brought them. Claims for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the commission. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission.

§ 25. **Compensation, how payable.** Compensation under the provisions of this chapter shall be payable periodically, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that all payments or payments as to any particular group may be made monthly or at any other period, as it may deem advisable. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments, provided the same shall be in the interest of justice. If the award requires payment of compensation otherwise than from the state fund all payments as required by the award shall be made directly to the commission or to a deputy specially authorized to receive the same, and disbursed in accordance with its award to the persons entitled thereto. And employers and insurance companies shall for such purpose be permitted, or when necessary to protect the interest of the beneficiary may be required, to make deposits to secure the prompt and convenient payment of such compensation.

§ 26. **Enforcement of payment in default.** If payment of compensation, or an installment thereof, due under the terms of an award be not made within ten days after the same is due, by the employer or insurance corporation liable therefor, the amount of such payment shall constitute a liquidated claim for damages against such employer or insurance corporation, which with an added penalty of fifty per centum may be recovered in an action to be instituted by the commission in the name of the people of the state. If such default be made in the payment of an installment of compensation and the whole amount of such compensation be not due, the commission may, if the present value of such compensation be computable, declare the whole amount thereof due, and recover the amount thereof with the added penalty of fifty per centum, as provided in this section. Any such action may be compromised by the commission or may be prosecuted to final judgment as, in the discretion of the commission, may best serve the interests of the persons entitled to receive the compensation or the benefits. Compensation recovered under this section shall be disbursed by the commission to the persons entitled thereto in accordance with the award. The penalty recovered pursuant to this section shall be paid into the state treasury, and be applicable to the expenses of the commission.

§ 27. **Depositing future payments.** If an award under this chapter requires payment of compensation by an employer or an insurance corporation in periodical payments, and the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies, the commission may

in its discretion, at any time, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer or insurance corporation shall be discharged from any further liability under such award and payment of the same shall be assumed by the state fund.

§ 28. **Limitation of right to compensation.** The right to claim compensation under this chapter shall be forever barred unless within one year after the injury, or if death result therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the commission.

§ 29. **Subrogation to remedies of employees.** If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same.

§ 30. **Revenues or benefits from other sources not to affect compensation.** No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension system which is not sustained in whole or in part by the contributions of the employee,

may be applied toward the payment of the death benefit provided by this chapter. (*Thus amended by Chap. 316, Laws 1914; in effect April 14, 1914.*)

§ 31. **Agreement for contribution by employee void.** No agreement by an employee to pay any portion of the premium paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer or to the cost of mutual insurance or other insurance, maintained for or carried for the purpose of providing compensation as herein required, shall be valid, and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor.

§ 32. **Waiver agreements void.** No agreement by an employee to waive his right to compensation under this chapter shall be valid.

§ 33. **Assignments; exemptions.** Claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Compensation and benefits shall be paid only to employees or their dependents.

§ 34. **Preferences.** The right of compensation granted by this chapter shall have the same preference or lien without limit of amount against the assets of the employer as is now or hereafter may be allowed by law for a claim for unpaid wages for labor.

ARTICLE 3.

Security for Compensation.

Section 50. Security for payment of compensation.

- 51. Posting of notice regarding compensation.
- 52. Effect of failure to secure compensation.
- 53. Release from all liability.
- 54. The insurance contract.

§ 50. **Security for payment of compensation.** An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or
2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter.

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission.

The commission may, in its discretion, for good cause shown, remit any such penalty, provided the employer in default secure compensation as provided in this section. (*Thus amended by Chap. 16, Laws 1914; in effect April 14, 1914.*)

§ 51. **Posting of notice regarding compensation.** Every employer who has complied with section fifty of this chapter shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the commission, stating the fact that he has complied with all the rules and regulations of the commission and that he has secured the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter.

§ 52. **Effect of failure to secure compensation.** Failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts, as prescribed by section eleven of this chapter.

§ 53. **Release from all liability.** An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed in this chapter except by the payment thereof by himself or his insurance carrier.

§ 54. **The insurance contract.** 1. Right of recourse to the insurance carrier. Every policy of insurance covering the liability of the employer for compensation issued by a stock company or by a mutual association authorized to transact workmen's compensation insurance in this state shall contain a provision setting forth the right of the commission to enforce in the name of the people of the state of New York for the benefit of the person entitled to the compensation in-

sured by the policy either by filing a separate application or by making the insurance carrier a party to the original application, the liability of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall to the extent thereof be a bar to the recovery against the other of the amount so paid.

2. Knowledge and jurisdiction of the employer extended to cover the insurance carrier. Every such policy shall contain a provision that, as between the employee and the insurance carrier, the notice or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter.

3. Insolvency of employer does not release the insurance carrier. Every such policy shall contain a provision to the effect that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy.

4. Limitation of indemnity agreements. Every contract or agreement of an employer the purpose of which is to indemnify him from loss or damage on account of the injury of an employee by accident means, or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it shall also cover liability for the payment of the compensation provided for by this chapter.

5. Cancellation of insurance contracts. No contract of insurance issued by a stock company or mutual association against liability arising under this chapter shall be cancelled within the time limit in such contract for its expiration until at least ten days after notice of intention to cancel such contract, on a date specified in such notice, shall be filed in the office of the commission and also served on the employer. Such notice shall be served on the employer by delivering it to him or by sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence provided that, if the employer be a partnership, then such notice may be so given to any one of the partners, and if the employer be a corporation, then the notice may be given to any agent or officer of the corporation upon whom legal process may be served.

ARTICLE 4.

State Workmen's Compensation Commission.

- Section 60. State workmen's compensation commission.
61. Secretary, deputies and other employees.
 62. Salaries and expenses.
 63. Office.
 64. Sessions of commission.
 65. Powers of individual commissioners and deputy commissioners.
 66. Powers and duties of secretary.
 67. Rules.
 68. Technical rules of evidence or procedure not required.
 69. Issue of subpoena; penalty for failure to obey.
 70. Recalcitrant witnesses punishable as for contempt.
 71. Fees and mileage of witnesses.
 72. Depositions.
 73. Transcript of stenographer's minutes: effect as evidence.
 74. Jurisdiction of commission to be continuing.
 75. Report of commission.
 76. Commission to furnish blank forms.

§ 60. State workmen's compensation commission. A state workmen's compensation commission is hereby created, consisting of five commissioners, to be appointed by the governor, by and with the advice and consent of the senate, one of whom shall be designated by the governor as chairman, not more than three of which shall belong to the same political party. The commissioner of labor shall also be an ex officio member of the commission but shall not have a vote on orders, decisions or awards. Appointments may be made during the recess of the senate, but shall be subject to confirmation by the senate at the next ensuing session of the legislature. The term of office of appointive members of the commission shall be five years, except that the first members thereof shall be appointed for such terms that the term of one member shall expire on January first, nineteen hundred and sixteen, and on January first of every succeeding year. Successors shall be appointed in like manner for a full term of five years. Vacancies shall be filled in like manner by appointment for the unexpired term. Each appointive member of the commission shall before entering upon the duties of his office execute an official undertaking in the sum of fifty thousand dollars to be approved by the comptroller and filed in his office. The governor may remove any appointive commissioner for inefficiency, neglect of duty or misconduct in office, giving him a copy of the charges and an opportunity of being publicly heard in person or by counsel, upon not less than ten days' notice. If such a commissioner be removed, the governor shall file in the office of the secretary of state a complete statement of all charges made against him and a complete record of his proceedings and his findings thereon. Each appointive commissioner shall devote his entire time to the duties of his office, and shall

not hold any position of trust or profit, or engage in any occupation or business interfering or inconsistent with his duties as such commissioner, or serve on or under any committee of a political party. The commission shall have an official seal which shall be judicially noticed.

§ 61. **Secretary, deputies and other employees.** The commission may appoint one or more deputy commissioners and a secretary to hold office during its pleasure. It may also employ, during its pleasure, an actuary, accountants, medical doctors, clerks, stenographers, inspectors and other employees as may be needed to carry out the provisions of this chapter. The authority, duties and compensation of all subordinates and employees, except as provided by this chapter, shall be fixed by the commission.

§ 62. **Salaries and expenses.** The chairman of the commission shall receive an annual salary of ten thousand dollars, and each other commissioner, an annual salary of seven thousand dollars. The secretary shall receive an annual salary of five thousand dollars. The commissioners and their subordinates shall be entitled to their actual and necessary expenses while traveling on the business of the commission. The commission may also make the necessary expenditure to obtain statistical and other information to establish classifications of employments with respect to hazards and risks. The salaries and compensation of the subordinates and all other expenses of the commission, including the premiums to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers signed by at least two commissioners.

§ 63. **Office.** The commission shall keep and maintain its principal office in the city of Albany, in rooms in the capitol assigned by the trustees of public buildings. The office shall be supplied with necessary office furniture, supplies, books, maps, stationery, telephone connections and other necessary appliances, at the expense of the state, payable in the same manner as other expenses of the commission.

§ 64. **Sessions of commission.** The commission shall be in continuous session and open for the transaction of business during all business hours of every day excepting Sundays and legal holidays. All sessions shall be open to the public and may be adjourned, upon entry thereof in its records, without further notice. Whenever convenience of parties will be promoted or delay and expense prevented, the commission may hold sessions in cities other than the city of Albany. A party may appear before such commission and be heard in person or by attorney. Every vote and official act of the commission shall be entered of record, and the records shall contain a record of each case considered, and the award, decision or order made with respect thereto, and all voting shall be by the calling of each com-

sioner's name by the secretary and each vote shall be recorded and cast. A majority of the commission shall constitute a quorum. A vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the full commission so long as a majority remains.

§ 65. **Powers of individual commissioners and deputy commissioners.** Any investigation, inquiry or hearing which the commission is authorized to hold or undertake may be held or taken by or before any commissioner or deputy commissioner, and the award, decision or order of a commissioner or deputy commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be deemed to be the award, decision or order of the commission. Each commissioner and deputy shall, for the purposes of this chapter, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. The commission may authorize any deputy to conduct any such investigation, inquiry or hearing, in which case he shall have the power of a commissioner in respect thereof.

§ 66. **Powers and duties of secretary.** The secretary of the commission shall:

1. Maintain a full and true record of all proceedings of the commission, of all documents or papers ordered filed by the commission, of decisions or orders made by a commissioner or deputy commissioner, and of all decisions or orders made by the commission or approved and confirmed by it and ordered filed, and he shall be responsible to the commission for the safe custody and preservation of all such documents at its office;
2. Have power to administer oaths in all parts of the state, so far as the exercise of such power is properly incident to the performance of his duty or that of the commission;
3. Designate, from time to time, with the approval of the commission, one of the clerks appointed by the commission to exercise the powers and duties of the secretary during his absence;
4. Under the direction of the commission, have general charge of its office, superintend its clerical business, and perform such other duties as the commission may prescribe.

§ 67. **Rules.** The commission shall adopt reasonable rules, not inconsistent with this chapter, regulating and providing for

1. The kind and character of notices, and the service thereof, in case of accident and injury to employees;
2. The nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to compensation;

3. The forms of application for those claiming to be entitled to compensation;

4. The method of making investigations, physical examinations and inspections;

5. The time within which adjudications and awards shall be made;

6. The conduct of hearings, investigations and inquiries;

7. The giving of undertakings by all subordinates who are empowered to receive and disburse moneys, to be approved by the attorney-general as to form and by the comptroller as to sufficiency.

8. Carrying into effect the provisions of this chapter;

9. The collection, maintenance and disbursement of the state insurance fund.

§ 68. **Technical rules of evidence or procedure not required.** The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

§ 69. **Issue of subpoena; penalty for failure to obey.** A subpoena shall be signed and issued by a commissioner, a deputy commissioner or by the secretary of the commission and may be served by any person of full age in the same manner as a subpoena issued out of a court of record. If a person fail, without reasonable cause, to attend in obedience to a subpoena, or to be sworn or examined or answer a question or produce a book or paper, or to subscribe and swear to his deposition after it has been correctly reduced to writing, he shall be guilty of a misdemeanor.

§ 70. **Recalcitrant witnesses punishable as for contempt.** If a person in attendance before the commission or a commissioner or deputy commissioner refuses, without reasonable cause, to be examined, or to answer a legal and pertinent question or to produce a book or paper, when ordered so to do by the commission or a commissioner or deputy commissioner, the commission may apply to a justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail. Upon the return of such order the justice shall examine under oath such person and give him an opportunity to be heard; and if the justice determine that he has refused without reasonable cause or legal excuse to be examined or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, there to remain

if he submits to do the act which he was so required to do or is charged according to law.

71. Fees and mileage of witnesses. Each witness who appears in obedience to a subpoena before the commission or a commissioner or deputy commissioner, or person employed by the commission to obtain the required information, shall receive for his attendance the fee and mileage provided for witnesses in civil cases in the supreme court, which shall be audited and paid from the state treasury in the same manner as other expenses of the commission. A witness subpoenaed at the instance of a party other than the commission, a commissioner, deputy commissioner or person acting under the authority of the commission shall be entitled to fees or compensation from the state treasury, if the commission certify that his testimony was material to the matter investigated, but not otherwise.

72. Depositions. The commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court.

73. Transcript of stenographer's minutes; effect as evidence. A certified copy of the testimony, evidence and procedure or of a specific part thereof, or of the testimony of a particular witness or of a specific part thereof, on any investigation, by a stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript thereof and to have been carefully compared by him with his original notes, may be received in evidence by the commission with the same effect as if such stenographer were present and testified to the facts so certified, and a copy of such transcript shall be furnished on demand to any party upon payment of the fee provided for a transcript of similar minutes in the supreme court.

74. Jurisdiction of commission to be continuing. The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just.

75. Report of commission. Annually on or before the first day of February, the commission shall make a report to the legislature, which shall include a statement of the number of awards made by it and the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the expenses of the commission, the condition of the state insurance fund, together with any other matter which the commission deems proper to report to the legislature, including any recommendations it may desire to make.

76. Commission to furnish blank forms. The commission shall

prepare and cause to be distributed so that the same may be readily available blank forms of application for compensation, notice to employers, proofs of injury or death, of medical or other attendance treatment, of employment and wage earnings, and for such other purposes as may be required. Insured employers shall constantly keep on hand a sufficient supply of such blanks.

ARTICLE 5.

State Insurance Fund.

- Section 90. Creation of state fund.
91. State treasurer custodian of fund.
 92. Surplus and reserve.
 93. Investment of surplus or reserve.
 94. Administration expense.
 95. Classification of risks and adjustment of premiums.
 96. Associations for accident prevention.
 97. Requirements in classifying employment and fixing and adjusting premium rates.
 98. Time of payment of premiums.
 99. Action for collection in case of default.
 100. Withdrawal from fund.
 101. Audit of payrolls.
 102. Falsification of payroll.
 103. Wilful misrepresentation.
 104. Inspections.
 105. Disclosures prohibited.

§ 90. **Creation of state fund.** There is hereby created a fund to be known as "the state insurance fund," for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of expenses in the manner provided in this chapter.

§ 91. **State treasurer custodian of fund.** The state treasurer shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon vouchers authorized by the commission and signed by any two members thereof. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor and with sureties approved by the state controller conditioned for the faithful performance of his duty as custodian of the state fund. The state treasurer may deposit any portion of the state fund not needed for immediate use, in the manner

and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

§ 92. **Surplus and reserve.** Ten per centum of the premiums collected from employers insured in the fund shall be set aside by the commission for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the commission such surplus shall be sufficiently large to cover the catastrophe hazard. The commission shall also set up and maintain a reserve adequate to meet anticipated losses and carry all claims and policies to maturity.

§ 93. **Investment of surplus or reserve.** The commission may, pursuant to a resolution of the commission approved by the comptroller, invest any of the surplus or reserve funds belonging to the state insurance fund in the same securities and investments authorized for investment by savings banks. All such securities or evidences of indebtedness shall be placed in the hands of the state treasurer who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The state treasurer shall pay all vouchers drawn on the state insurance fund for the making of such investments when signed by two members of the commission, upon delivery of such securities or evidences of indebtedness to him, when there is attached to such vouchers a certified copy of the resolution of the commission authorizing the investment. The commission may, upon like resolution approved by the comptroller, sell any of such securities.

§ 94. **Administration expense.** The entire expense of administering the state insurance fund shall be paid in the first instance by the state, out of moneys appropriated therefor. In the month of January, nineteen hundred and eighteen, and annually thereafter in such month, the commission shall ascertain the just amount incurred by the commission during the preceding calendar year, in the administration of the state insurance fund exclusive of the expense for the examination, determination and payment of claims, and shall refund such amount to the state treasury. If there be employees of the commission other than the commissioners themselves and the secretary whose time is devoted partly to the general work of the commission and partly to the work of the state insurance fund, and in case there is other expense which is incurred jointly on behalf of the general work of the commission and the state insurance fund, an equitable apportionment of the expense shall be made for such purpose and the part thereof which is applicable to the state insurance

fund shall be chargeable thereto. As soon as practicable after December thirty-one, nineteen hundred and seventeen, and annually thereafter, the commission shall calculate the total administrative expense incurred during the preceding calendar year in connection with the examination, determination and payment of claims and the percentage which this expense bore to the total compensation payments made during that year. The percentage so calculated and determined shall be assessed against the insurance carriers including the state fund as an addition to the payments required from them in the settlement of claims during the year immediately following, and the amount so secured shall be transferred to the state treasury to reimburse it for this portion of the expense of administering this chapter.

§ 95. **Classification of risks and adjustment of premiums.** Employments coming under the provisions of this chapter shall be divided for the purposes of the state fund, into the groups set forth in section two of this chapter. Separate accounts shall be kept of the amounts collected and expended in respect to each such group for convenience in determining equitable rates; but for the purpose of paying compensation the state fund shall be deemed one and indivisible. The commission shall have power to rearrange any of the groups set forth in section two by withdrawing any employment embraced in it and transferring it wholly or in part to any other group, and from such employments to set up new groups at its discretion. The commission shall determine the hazards of the different classes composing each group and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk.

§ 96. **Associations for accident prevention.** The employers in any of the groups described in section two or established by the commission may with the approval of the commission form themselves into an association for accident prevention, and may make rules for that purpose. If the commission is of the opinion that an association so formed sufficiently represents the employers in such group, it may approve such rules, and when so approved and approved by the industrial board of the labor department they shall be binding on all employers in such group. If such an approved association appoint an inspector or expert for the purpose of accident prevention, the commission may at its discretion provide in whole or in part for the payment of the remuneration and expenses of such inspector or ex-

ert, such payment to be charged in the accounting to such group. Every such approved association may make recommendations to the commission concerning the fixing of premiums for classes of hazards, and for individual risks within such group.

§ 97. Requirements in classifying employment and fixing and adjusting premium rates. The following requirements shall be observed in classifying employments and fixing and adjusting premium rates:

1. The commission shall keep an accurate account of the money paid in premiums by each of the several classes of employments or industries, and the disbursements on account of injuries and deaths of employees thereof, including the setting up of reserves adequate to meet anticipated losses and to carry the claims to maturity, and also, on account of the money received from each individual employer and the amount disbursed from the state insurance fund on account of injuries and death of the employees of such employer, including the reserves so set up:

2. On January first, nineteen hundred and fifteen, and every fifth year thereafter, and at such other times as the commission, in its discretion, may determine, a readjustment of the rate shall be made for each of the several groups of employment or industries and of each hazard class therein, which, in the judgment of the commission, shall have developed an average loss ratio, in accordance with the experience of the commission in the administration of the law as shown by the accounts kept as provided herein:

3. If any such accounting show an aggregate balance (deemed by the commission to be safely and properly divisible) remaining to the credit of any class of employment or industry, after the amount required shall have been credited to the surplus and reserve funds and after the payment of all awards for injury or death lawfully chargeable against the same, the commission may in its discretion credit to each individual member of such group, who shall have been a subscriber to the state insurance fund for a period of six months or more prior to the time of such readjustment, and whose premium or premiums exceed the amount of the disbursements from the fund on account of injuries or death of his employees during such period, on the instalment or instalments of premiums next due from him such proportion of such balance as the amount of his prior paid premiums sustains to the whole amount of such premiums paid by the group in which he belongs since the last readjustment of rates:

4. If the amount of premiums collected from any employer at the beginning of any period of six months is ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such six

months, and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and, if such wage expenditure for such period is less than the amount on which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments, at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such six months, such employer shall immediately upon being advised of the true amount of such premium due, forthwith pay to the treasurer of the state an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such six months' period.

§ 98. **Time of payment of premiums.** Except as otherwise provided in this chapter, all premiums shall be paid by every employer into the state insurance fund on or before July first, nineteen hundred and fourteen, and semi-annually thereafter, or at such other time or times as may be prescribed by the commission. The commission shall mail a receipt for the same to the employer and place the same to the credit of the state insurance fund in the custody of the state treasurer.

§ 99. **Action for collection in case of default.** If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the people of the state of New York, and it shall be the duty of the commission on the first Monday of each month after July first, nineteen hundred and fourteen, to certify to the attorney-general of the state the names and residences, or places of business, of all employers known to the commission to be in default for such payment or payments for a longer period than five days and the amount due from such employer, and it shall then be the duty of the attorney-general forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this chapter requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the state treasurer for credit to the state insurance fund.

§ 100. **Withdrawal from fund.** Any employer may, upon complying with subdivision two or three of section fifty of this chapter, withdraw from the fund by turning in his insurance contract for cancel-

ion, provided he is not in arrears for premiums due the fund and is given to the commission written notice of his intention to withdraw within thirty days before the expiration of the period for which he has elected to insure in the fund; provided that in case any employer so withdraws, his liability to assessments shall, notwithstanding such withdrawal, continue for one year after the date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal.

§ 101. Audit of payrolls. Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish to the commission, upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the commission shall require to verify the number of employees and the amount of the payroll.

§ 102. Falsification of payroll. An employer who shall wilfully misrepresent the amount of the payroll upon which the premiums chargeable by the state insurance fund is to be based shall be liable to the state in ten times the amount of the difference between the premiums paid and the amount the employer should have paid had the payroll been correctly computed; and the liability to the state under this section shall be enforced in a civil action in the name of the state insurance fund, and any amount so collected shall become a part of such fund.

§ 103. Wilful misrepresentation. Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order to obtain payment out of such fund, shall be guilty of a misdemeanor.

§ 104. Inspections. The commission shall have the right to inspect plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the commission shall have free access to such premises during regular working hours.

§ 105. Disclosures prohibited. Information acquired by the commission or its officers or employees from employers or employees pursuant to this chapter shall not be opened to public inspection, and no officer or employee of the commission who, without authority of the commission or pursuant to its rules or as otherwise required by law shall disclose the same shall be guilty of a misdemeanor.

ARTICLE 6.

Miscellaneous Provisions.

§ 110. Penalties applicable to expense of commission.

111. Record and report of injuries by employers.

112. Information to be furnished by employer.

113. Inspection of records of employers.

- 114. Interstate commerce.
- 115. Penalties for false representations.
- 116. Limitation of time.
- 117. Duties of commissioner of labor.
- 118. Unconstitutional provisions.
- 119. Actions or causes of action pending.

§ 110. **Penalties applicable to expenses of commission.** All penalties imposed by this chapter shall be applicable to the expenses of the commission. When collected by the commission such penalties shall be paid into the state treasury and be thereafter appropriated by the legislature for the purposes prescribed by this section.

§ 111. **Record and report of injuries by employers.** Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing by the employer to the commission upon blanks to be procured from the commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the commission. An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.

§ 112. **Information to be furnished by employer.** Every employer shall furnish the commission, upon request, any information required by it to carry out the provisions of this chapter. The commission, a commissioner, deputy commissioner, or any person deputized by the commission for that purpose, may examine under oath any employer, officer, agent or employee. An employer or an employee receiving from the commission a blank with directions to file the same shall cause the same to be properly filled out so as to answer fully and correctly all questions therein, or if unable to do so, shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the commission within the period fixed by the commission therefor.

§ 113. **Inspection of records of employers.** All books, records and payrolls of the employers showing or reflecting in any way upon the amount of wage expenditures of such employers shall always be open for inspection by the commission or any of its authorized auditors, accountants or inspectors for the purpose of ascertaining the correctness of the wage expenditure and number of men employed and such other information as may be necessary for the uses and purposes of the commission in the administration of this chapter.

§ 114. **Interstate commerce.** The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that each employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees.

§ 115. **Penalties for false representation.** If for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for himself or any other person, any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor.

§ 116. **Limitation of time.** No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend.

§ 117. **Duties of commissioner of labor.** The commissioner of labor shall render to the commission any proper aid and assistance by the department of labor as in his judgment does not interfere with the proper conduct of such department.

§ 118. **Unconstitutional provisions.** If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

§ 119. **Actions or causes of action pending.** This act shall not affect any action pending or cause of action existing or which accrued prior to July first, nineteen hundred and fourteen.

ARTICLE 7.

Laws Repealed; When to Take Effect.

Section 130. Laws repealed.

131. When to take effect.

§ 130. **Laws repealed.** Article fourteen-a and sections two hundred and fifteen to two hundred and nineteen-g, both inclusive, of chapter forty-six of the laws of nineteen hundred and nine, as amended by chapter six hundred and seventy-four of the laws of nineteen hundred and ten, are hereby repealed.

§ 131. **When to take effect.** This chapter shall take effect immediately, provided that the application of this chapter as between employers and employees and the payment of compensation for injuries to employees or their dependents, in case of death, shall take effect July first, nineteen hundred and fourteen, but payments into the state insurance fund may be made prior to July first, nineteen hundred and fourteen.

§ 2. This act shall take effect immediately, except as provided in section one hundred and thirty-one as re-enacted hereby.

STATE OF NEW YORK, }
Office of the Secretary of State. } ss:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

MITCHELL MAY,
Secretary of State

Office Supreme Court, U. S.

FILED

JAN 31 1917

JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1916

No. 280

SOUTHERN PACIFIC COMPANY

Plaintiff-in-Error

AGAINST

MARIE JENSEN

Defendant-in-Error

**IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION
THIRD DEPARTMENT, OF THE STATE OF NEW YORK**

BRIEF OF PLAINTIFF-IN-ERROR ON REARGUMENT

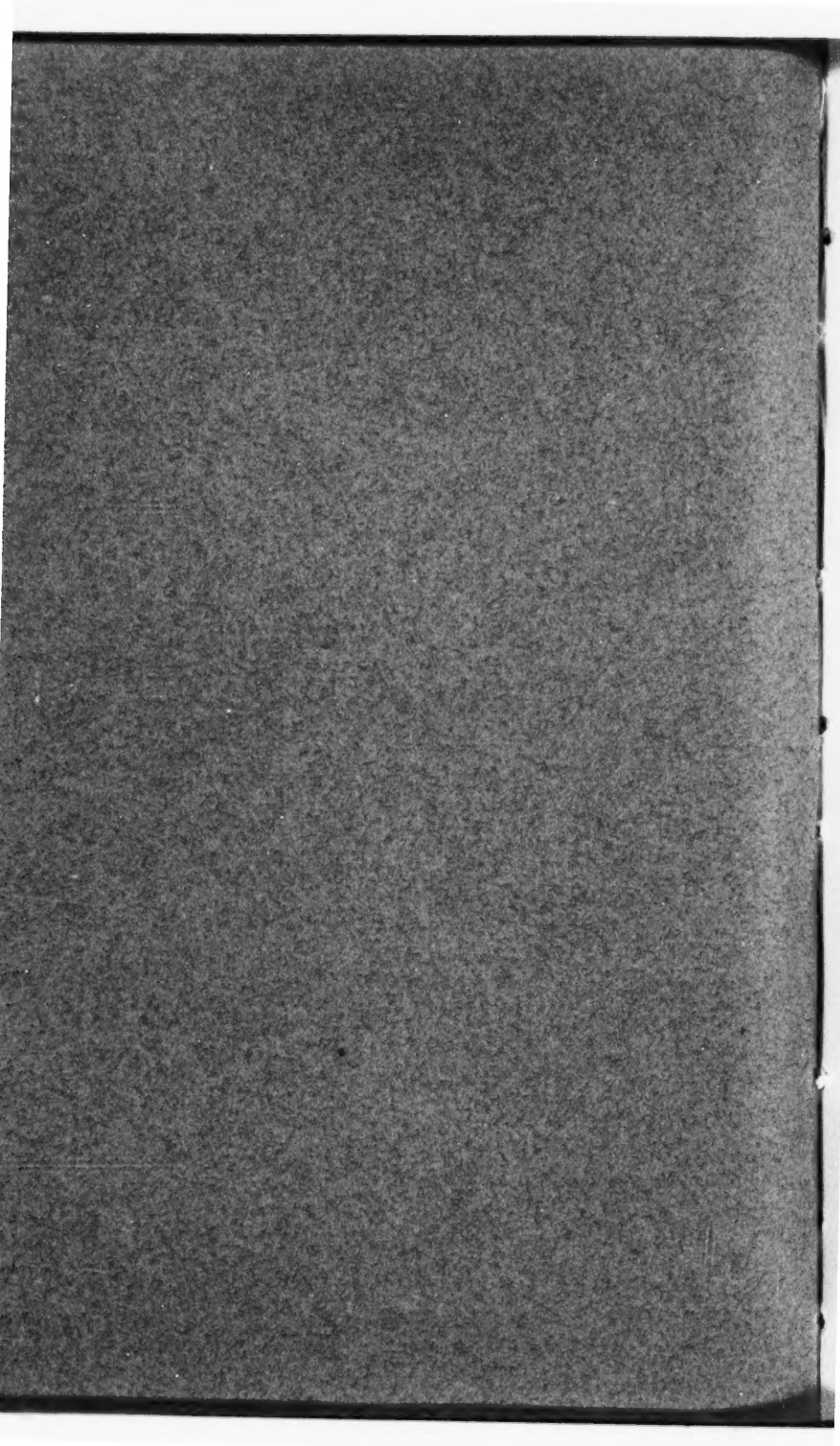
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 280.

SOUTHERN PACIFIC COMPANY,
Plaintiff-in-Error,

AGAINST

MARIE JENSEN,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD
DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF OF PLAINTIFF-IN-ERROR ON
REARGUMENT

STATEMENT OF THE CASE

This cause involves the constitutionality of the Workmen's Compensation Law of the State of New York.

The defendant-in-error began this proceeding to obtain compensation for the death of her husband under the provisions of the New York Workmen's Compensation Law by the filing of a claim for compensation with the

State Workmen's Compensation Commission, a body established for the administration of that law (p. 1). The Commission after a hearing made its findings which are on pages 8 and 9 of the Record.

From those findings it appears that Christen Jensen was killed on August 15, 1914, while in the employ of the plaintiff-in-error, the Southern Pacific Company. Jensen's work consisted in operating a small electric freight truck upon which cargo was carried out of the Company's steamship *El Oriente* over a gangway to the pier. In some way Jensen jammed the truck against the guide pieces on the gangway and then reversed the direction of his truck and proceeded backward at full speed into the port in the side of the vessel. He failed to lower his head as he did this, and his head struck the ship along the top line of the port and his neck was broken.

The vessel was at the time lying in navigable waters of the United States about 10 feet from pier 49, North River, New York City. The cargo on the vessel which Jensen was engaged in discharging had come from Galveston, Texas. The only business done by the Southern Pacific Company in New York is the carrying of passengers and merchandise in interstate commerce.

The Southern Pacific Company is a common carrier by railroad.

At the hearing before the Commission the plaintiff-in-error urged that this claim did not come within the terms of the Compensation Law (p. 10) because

1. The accident took place on board a vessel owned by a foreign corporation and when both workman and employer were engaged solely in interstate commerce;

2. The injury was one with respect to which Congress may and has established a rule of liability and under section 114 the law had no application;

3. The workman was injured in the operation of a vessel of another state engaged in interstate commerce, while the law applies only to those engaged in the operation of a New York vessel (Sec. 2, Group 8).

The plaintiff-in-error also urged that the law as applied to this injury was contrary to the Constitution of the United States because

1. It takes property without due process of law;

2. It constitutes a regulation of and burden upon interstate commerce;

3. It denies the plaintiff-in-error the equal protection of the laws because it does not afford an exclusive remedy to this employer, but leaves it and its vessels subject to suit in admiralty.

4. It violates Article 3, Section 2 of the Constitution of the United States conferring admiralty jurisdiction upon the Courts of the United States.

5. The plaintiff-in-error also urged that the law conflicted with the rule of liability established by Congress [The Federal Employer's Liability Act].

The Commission overruled all the objections and awarded compensation of \$5.87 per week to the widow during widowhood (with two years' compensation in case of remarriage) and compensation of \$1.96 per week to each of the two children until they should reach the age

of eighteen. One hundred dollars funeral expenses were also awarded.

Pursuant to section 23 of the law, the employer appealed from the award or decision of the Commission to the Appellate Division of the Supreme Court, Third Department. The award was there confirmed without opinion (pp. 11, 12).

The employer then appealed to the Court of Appeals, where the order of the Appellate Division was affirmed and the record was remitted to the Appellate Division of the Supreme Court, Third Department (pp. 14, 15). Thereupon the employer sued out its writ of error in this Court.

The opinion of the Court of Appeals, written by Judge Miller, begins on page 16 of the Record, and is reported in 215 N. Y. 514. The opinion in the case of *Clyde Steamship Company v. Walker*, reargued herewith, in which was considered one of the points raised on this appeal, is found at page 16 of the Record in that case and is reported in 215 N. Y. 529.

SPECIFICATION OF ERRORS

Plaintiff-in-error contends that the Court of Appeals erred in not deciding that

1. The New York Workmen's Compensation Law is contrary to the Constitution of the United States, in that it takes plaintiff-in-error's property without due process of law;

2. The New York Workmen's Compensation Law is unconstitutional, in that it constitutes a regulation of and burden upon interstate commerce;

3. The Workmen's Compensation Law is unconstitutional, in that it denies the plaintiff-in-error the equal protection of the laws because it does not give to employers of men working on shipboard the freedom from further liability for injuries to workmen that is accorded to other employers;

4. The Workmen's Compensation Law is unconstitutional in that it violates Article 3, Section 2 of the Constitution of the United States conferring admiralty jurisdiction upon the Courts of the United States;

5. The Workmen's Compensation Law when applied in this case is in conflict with the Federal Employers' Liability Act.

(Assignments of Error, pp. 26, 27.)

BRIEF OF ARGUMENT

1. The New York Workmen's Compensation Law deprives the plaintiff-in-error of property without due process of law, in violation of the fourteenth amendment of the Constitution of the United States.

2. The New York Workmen's Compensation Law imposes a direct and unconstitutional burden upon the interstate commerce transacted by the plaintiff-in-error.

3. The New York Workmen's Compensation Law denies this plaintiff-in-error the equal protection of the laws because, although it complies with the Compensation Law, it is not freed from further liability to workmen injured on shipboard, but remains liable to suits in admiralty.

4. The New York Workmen's Compensation Law as applied to this case infringes upon the exclusive admiralty jurisdiction of the United States.

5. Congress, by the Federal Employers' Liability Act of 1908, has dealt with and assumed exclusive jurisdiction over the field of compensation payable for injuries received by the employee of a common carrier by railroad while both employer and employee are engaged in interstate commerce.

THE NEW YORK WORKMEN'S COMPENSATION LAW

The law,* after defining forty-two groups of industries to which it applies, provides in section 10 as follows:

"Liability for Compensation.—Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty."

It is provided that the liability thus prescribed shall be exclusive unless the employer fails to secure the payment of such compensation in the manner required by the law (Sec. 11).

The option is given the employer to secure such com-

*Chapter 816 of the Laws of 1913, as reenacted and amended by chapter 41 of the Laws of 1914, constituting chapter 67 of the Consolidated Laws, as amended by chapter 316 of the Laws of 1914. The law has been further amended by chapters 167, 168, 615 and 674 of the Laws of 1915, and by chapter 622 of the Laws of 1916.

pensation by paying premiums to the State and thus insuring in the State fund, to insure with insurance companies, or to carry his own insurance (Sec. 50).

For failure to pay or provide compensation the employer, in addition to being liable to a suit by the injured employee, with the ordinary common law defenses abolished, or liable for compensation at the workman's election (Sec. 11), is liable to a penalty equal to the *pro rata* premium which would have been payable for insurance in the State fund during the period of non-compliance with the Law (Sec. 50).

In Section 15 of the Law is a schedule setting forth the amount of compensation payable to the employee for various kinds of disability therein specified; and in Section 16 is provided the compensation payable to the representatives of deceased workmen.

In addition to the payment of compensation the employer must furnish the employee with such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or requested by the employee during sixty days after the injury (Sec. 13), and in case of the death of the employee, the employer must pay the reasonable funeral expenses (Sec. 16).

It is presumed that all claims made for compensation come within the law and that sufficient notice has been given in the absence of substantial evidence to the contrary (Sec. 21). The right of compensation is preferred without limit of amount against the assets of the employer (Sec. 34).

The amount of the compensation depends upon the

extent of the disability and the average earnings of the workman (whether the earnings are from the present employer or not) if he has worked steadily in the employment in which he was injured, but otherwise upon his earning capacity as measured by the earnings of those who have worked in the same trade. In case of death it depends also upon the number of legal dependents and the length of time they live (Secs. 14-16).

The only alternative that the employer has to the payment of the arbitrary sums specified in the schedules of the law is to pay to the State Fund or to some insurance company a premium of from a fraction of 1 per cent. to about one-third of the payroll.

Certain features of the operation of the law may here be pointed out.

(a) The law imposes no rule of conduct upon the employer with respect to conditions of labor in the various industries covered by the law. It imposes no duty with regard to the place where the workmen shall work, the character of the machinery, tools or appliances to be used, the rules or regulations to be promulgated for the safety of those employed in and about the industry. It prescribes no safeguards or safety appliances. There is not a word in the law dealing with the health, comfort, or safety of the employee, or the conditions of labor.

(b) It imposes liability on the employer although he is carrying on a lawful business in a lawful manner, although he has used every precaution that human foresight and ingenuity can devise, although the accident was

caused by the wrongful act of a third party or by *vis major*. The Court of Appeals has said:

"Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made." *Winfield v. New York Central, etc., R. R. Co.*, 216 N. Y. 284, 289.

(c) It imposes liability upon the employer to pay compensation to the employee for injuries caused solely by the negligence of the employee himself, no matter how gross.

(d) The amount of money that is taken from the employer to compensate the employee, is arbitrary, and is not based upon the actual damage suffered or loss sustained by the injured employee.

(e) There is no limitation upon the period of time for which compensation for permanent total disability or death must be paid. Compensation is payable so long as the injured man or the designated dependents live.

(f) While the law purports to deal with those engaged in hazardous employments, nearly all the recognized industries are included within the law. Substantially all employments are declared hazardous, whether they are so in fact or not.

(g) The mere filing of a claim for compensation puts upon the employer the burden of disproving the claim by substantial evidence. Jurisdictional facts including the fact of notice are presumed (Sec. 21).

(h) The law has been held to be extra-territorial in its operation. It applies to injuries happening outside the

State as well as to injuries happening within the State. *Matter of Post v. Burger*, 216 N. Y. 544.

(i) The law is compulsory on all employers engaged in the classes of business to which it applies. The employer has no election to pay compensation or to be liable to suit with the common law defenses abolished, as he has under most other workmen's compensation laws. If he refuses to comply with the provisions of the law, he is not only penalized and liable to a common law suit with the common law defenses abolished, but at his employee's election he is also liable for the compensation provided in the law.

THE HISTORY OF WORKMEN'S COMPENSATION LAWS IN NEW YORK

In 1910 the New York Legislature passed a workmen's compensation law (L. 1910, ch. 352) whereby, with the consent of the employer and the employee, specified sums should be paid to injured workmen or their dependents in lieu of other compensation.

Later the same year there was also passed a compulsory compensation law applicable to a few extra-hazardous employments. This law required the employer to pay compensation to the injured employee, without regard to fault (L. 1910, ch. 674). The Court of Appeals in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, held this compulsory law contrary to the constitutions both of the State of New York and of the United States, as taking property without due process of law.

The due process clause of the State Constitution

"No person shall * * * be deprived of life, liberty or property without due process of law" (Art. 1, sec. 6),

was substantially the same as the similar guarantee in the 14th Amendment to the Constitution of the United States:

"Nor shall any State deprive any person of life, liberty or property, without due process of law."

In holding that the due process clauses of both the Federal and the State Constitutions were violated by the compensation law involved in the *Ives* case, the Court said, at pages 293, 294:

"One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers enumerated in the new statute, and as to them it provides that they shall be liable to their employees for personal injury by accident to any workman arising out of and in the course of the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment or one inherent in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and wilful misconduct of the injured workman. It is conceded that this is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head."

And again at page 298:

"We conclude, therefore, that in its basic and vital features the right given to the employee by this statute, does not preserve to the employer the 'due process' of law guaranteed by the Constitutions, for it authorizes the taking of the employer's property without his consent and without his fault."

Of the argument in support of the constitutionality of the law under the police power, the Court said :

"In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government" (p. 301).

Then applying these principles to the law before it, the court proceeded :

"It does nothing to conserve the health, safety or morals of the employees, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employee, except where the latter fault is such as to constitute serious and willful misconduct. Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health and morals of his employees, is liable in damages to any employee who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employee himself" (p. 302).

The constitution of the State was thereafter amended so as to empower the Legislature to pass a compensation law (Constitution of New York, Art. I, sec. 19, in effect

Jan. 1, 1914). Late in 1913 the Legislature enacted the compulsory workmen's compensation law involved in this cause (L. 1913, ch. 816) and in 1914 it re-enacted the same law (L. 1914, ch. 41).

The constitutionality of this law was challenged in the case at bar, and the Court of Appeals upheld the law.

The workmen's compensation law which was considered in the *Ives* case was in its general scheme similar to the present law, although its provisions were far less drastic. The present law covers all injuries arising out of and in the course of the employment; the earlier law covered such injuries only when due to a necessary or inherent danger of the employment, or when due to the employer's fault. Under the earlier law, the employee was not entitled to compensation when the injury was caused in whole or in part by the serious and willful misconduct of the workman; under the present law the workman is not debarred unless the injury is occasioned by the willful intention of the workman to injure or kill himself or another or results solely from his intoxication while on duty. The scale of compensation was lower under the earlier law and that law applied only to eight groups of occupations which were in fact extra-hazardous, while the present law applies to nearly all the recognized industries.

The Court of Appeals in the *Ives* case held that the scheme of compensation provided in the earlier law, however desirable as an economic principle, was inconsistent with our form of government and unconstitutional because it resulted in compelling an employer, without his fault and without his consent, to compensate an employee for his injuries.

The Court of Appeals in upholding the constitution-

ality of the present law did not express the opinion that the *Ives* case was wrongly decided; it attempted to distinguish its earlier decision. Although apparently conceding that the underlying theory of the two laws was the same, it thought that there was such a fundamental distinction between the law under consideration in the *Ives* case and the present compensation law that the decision in the *Ives* case was not controlling.

The first distinction which the Court suggested is that the former law

"made the employer liable in a suit for damages though without even imputable fault and regardless of the fault of the injured employee, short of serious and wilful misconduct. This act protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation of all cases and from the certainty of defeat if unable to establish a case of actionable negligence" (p. 20).

This suggested difference is not a difference between the unconstitutional compensation law considered in the *Ives* case and the present law, but is a distinction between a system of liability and a system of compensation. The law involved in the *Ives* case, no less than the present law, was a compensation law. The former law required the employer

"to pay compensation at the rates set out in section two hundred and nineteen-a."

The present law requires the employer to

"pay or provide * * * compensation according to the schedules of this article."

As the former law fixed the *amount* of compensation, extravagant or insufficient verdicts under that law were

no less impossible than under the present law. As the compensation was payable although the employer was not at fault, "certainty of defeat if unable to establish a cause of actionable negligence" was as impossible under that law as under this law.

Disputes arising under the former law were to be determined either by arbitration or by an action at law (Sec. 219*d*). Under this law disputes are determined by the Commission, with an appeal from its decision to the courts. The fact—if it be a fact—that under the present law the workman may experience less delay in obtaining compensation by pressing his claim before the Commission than he would have experienced under the former law can hardly be a ground of distinction in favor of the present law when its constitutionality is being questioned by the employer.

The next distinction which the Court makes is that the former law made no attempt to distribute the burden of paying compensation, whereas the present law aims to distribute the burden in proportion to the risk over the industries affected. But a requirement of insurance against a liability can hardly be urged as justification for the imposition of that liability. The liability imposed by the former law was of the same character as that imposed by the present law—a liability to pay compensation irrespective of fault. That liability was held to be beyond the power of the State to impose. When the State again attempts to impose such a liability how can it be urged that the objection to the State's lack of power can be met by requiring the employer to insure that liability which the State is without power to impose?

FIRST POINT

THE NEW YORK WORKMEN'S COMPENSATION LAW DEPRIVES THE PLAINTIFF-IN-ERROR OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

This Court has not yet passed upon the constitutionality of a State compulsory workmen's compensation law. An optional law applying to employers of five or more workmen was before it in *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571, 577, but, as the Court there pointed out, under that law "no employer is obliged to go into this plan. He may stay out of it altogether if he will." And in that case the employer had stayed out of the plan. The sole question presented in that case was whether "the classification of employers and employees created by the act is arbitrary and unreasonable" (p. 575). The question involved here did not and could not arise in that case.

An incidental question arising under a compulsory compensation law was before this Court in *Northern Pacific Ry. Co. v. Meese*, 239 U. S. 614, but the constitutionality of that law as a compensation law was not involved. There the question arose whether the United States District Court for one of the Districts of Washington was right in holding that the Washington law had repealed the death statute as to an employee suing a third party for an injury received at the plant (206 Fed. 222), or whether the Circuit Court of Appeals was right in holding that the death statute was not repealed under

those circumstances (211 Fed. 254). As the Supreme Court of the State of Washington had placed the former construction upon the law (*Peet v. Mills*, 76 Wash. 437), this Court reversed the decision of the Circuit Court of Appeals and affirmed the action of the District Court, because, as was said by Mr. Justice McReynolds:

"It is settled doctrine that Federal Courts must accept the construction of a State statute deliberately adopted by its highest court."

The only constitutional question involved was whether the abolition of the right of action for death in certain cases constituted a denial of the equal protection of the laws. Of this the Court said:

"Respondents' suggestion that the construction of the act adopted by the trial court would cause it to conflict with the equal protection clause of the Fourteenth Amendment, is without merit. They have raised no other question involving application of the Federal Constitution."

In the state courts there have been several decisions upon the constitutionality of compulsory compensation laws. The first compulsory compensation law of New York was, as we have seen, held unconstitutional in *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271. A Kentucky law, optional in form, but deemed to be compulsory in fact, was overthrown in *Kentucky State Journal v. Workmen's Compensation Board*, 161 Ky. 562 (170 S. W. 1166), rehearing denied 162 Ky. 387 (172 S. W. 674).

On the other hand, the Washington Compensation Law was upheld by the State Court in *State v. Clausen*, 65 Wash. 156 (117 Pac. 1101), although its constitutionality is now challenged in this court, *Mountain Tim-*

ber Co. v. Washington. The California law was sustained by a divided Court in *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, largely upon the authority of the *Clausen* case, and the case now under review.

As this Court has not passed upon the constitutionality of any compulsory compensation law, we must look to the principles which it has laid down in its interpretation of the due process clause in other cases. "Due process of law", we find to be substantially equivalent to "the law of the land". Of the words, "due process of law", this Court said in *Dent v. West Virginia*, 129 U. S. 114, 123:

"They were deemed to be equivalent to 'the law of the land'. In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case."

In ascertaining whether legislation meets with the due process requirement,

"We must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272, 277.

In *Lowe v. Kansas*, 163 U. S. 81, 85, the Court said:

"Whether the mode of proceeding, prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases."

In *Twining v. New Jersey*, 211 U. S. 78, 101, the Court said:

"Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."

In *Holden vs. Hardy*, 169 U. S. 366, 390, the Court said:

"It is certain that these words [due process of law] imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defence."

What has hitherto been the settled mode of requiring from one person compensation for injury sustained by another is that the person whose property is sought to be taken have an opportunity to be heard upon the question of his fault before he has been condemned. He has had opportunity to defend himself by showing that the accident occurred through inevitable accident or through the fault of those for whom he is not responsible. He

has been allowed to show that the person seeking compensation is himself solely responsible for the damages sustained. He has been allowed to show what sum of money will work a complete *restitutio in integrum* to the injured person.

The system which this law inaugurates is entirely at variance with what has heretofore been the universal method of administering justice. Not only is there a departure from forms of procedure, but the very basis of the liability is one unknown to the common law and never until recently suggested in any country where by written constitution government is forbidden to take property without due process of law.

"While the methods by which justice is administered are subject to constant fluctuation", even under our written constitutions, "the cardinal principles of justice are immutable", *Holden vs. Hardy*, 169 U. S. 366, 387.

A cardinal principle of justice and a fundamental principle of our law sanctioned by the decisions of this Court is that, with certain historical exceptions, liability cannot be imposed without fault, and that the loss in case of inevitable accident must lie where it falls.

In the *Nitro-Glycerine* case, 15 Wall. 524, 538, this Court said :

" 'No case or principle can be found', said Mr. Justice Nelson, in denying a new trial [in *Harvey vs. Dunlap*, Lalor's Reports, 193] 'or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part'; and in this conclusion we all agree."

This Court said in *City of Chicago v. Sturges*, 222 U. S. 313 :

"It is a general principle of our law that there is no individual liability for an act which ordinary human

care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall."

In *St. Louis, I. M. & S. Ry. Co. v. Wynne*, 224 U. S. 354, 360, this Court held unconstitutional a statute that "takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right," because "plainly this cannot be done consistently with due process of law."

In *Chicago, R. I. etc. Ry. Co. v. Zerneck*, 183 U. S. 582, 586, the Court said:

"The specific contention is that the Company is deprived of its defence, and not only declared guilty of negligence and wrongdoing without a hearing, but, adjudged to suffer without wrongdoing, indeed for the crimes of others which the Company could not have foreseen or have prevented. Thus described, the statute seemed objectionable."

This principle has also been frequently recognized in the state courts. In states in which there is no law requiring railroad companies to fence their lines, statutes imposing an absolute liability upon railroad companies for stock killed by trains, irrespective of fault, have uniformly been declared unconstitutional.

Joliffe v. Brown, 14 Wash. 155;

Oregon Ry. & Nav. Co. v. Smalley, 1 Wash. 206;

Birmingham Mineral Co. v. Parsons, 100 Ala.

662;

Zeigler v. South & North Alabama R. R. Co.,

58 Ala. 594;

Bielenberg v. Montana U. Ry. Co., 8 Mont. 271;

Thompson v. Northern Pacific R. R. Co., 8 Mont. 279;

Denver & Rio Grande v. Outcalt, 2 Colo. App. 395;

Sweetland v. At. T. & S. F. R. R. Co., 22 Colo. 220;

Schenck v. Union Pac. Ry. Co., 5 Wyo. 430;

Jensen v. Union Pac. Ry. Co., 6 Utah, 253;

Atchison & Neb. R. R. Co. v. Baty, 6 Neb. 37;

Catril v. Union Pac. R. R. Co., 2 Idaho, 576.

Likewise, a statute requiring a carrier to bury at its expense persons dying while on its cars, or killed by collision, was held unconstitutional because it attempted to impose a liability where the railroad company violated no law and had been guilty of no negligence. *Ohio & Miss. R. Co. v. Lackey*, 78 Ill. 55.

In sustaining an optional Workmen's Compensation Law the Supreme Court of Texas said in *Middleton v. Texas Power & Light Co.*, 185 S. W. 556, 559:

"A legislature may in proper instances prescribe duties and penalize their breach through an authorization for the recovery of consequent damages. But it is wholly without any power to deny the citizen the right of making any defense when sued in the courts. There is no such thing in this country as taking one man's property without his consent and giving it to another by legislative edict. That is nothing less than confiscation by legislative decree. If this Act, therefore, had declared an employer not consenting to its provisions absolutely liable in damages at the suit of an employee for any injuries sustained by the latter in the employment, without reference to any wrong or breach of duty committed by the employer, it would have been void. Such a law would have amounted to a legislature forfeiture of property rights, regardless of the holding

of any court upon the question. The Act in its effect would have been the same if it had sought to deprive the employer of all defenses to such a suit."

The New York Workmen's Compensation Law strikes at the very fundamentals of constitutional freedom of contract. Of this fundamental right this Court said in *Coppage v. Kansas*, 236 U. S. 1, 14:

"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense."

There and in the case of *Adair v. U. S.*, 208 U. S. 161, this Court protected the right to buy labor without interference, and it protected the right to sell labor without interference in *Truax v. Raich*, 239 U. S. 33, 41, where it was said:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure."

The Court of Appeals has said that the compensation law should be construed

"to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the Act for a disability or the death of the employee as therein stated." *Matter of Post v. Burger*, 216 N. Y. 544, 554.

Without the consent and against the objection of the employer a "contract" is forced upon him to pay arbitrary sums to employees injured accidentally, by the fault of strangers, or even by the fault of the workman himself; and upon the employee is forced a "contract" to give up all claims against the employer except for compensation. This interference with the use of labor in the conduct of business is far more substantial than that condemned in the *Coppage* case.

The law, then, takes the property of the employer without his fault and without his consent to aid employees suffering injury through pure accident, through the wrong of third parties or through their own wrong. It deprives the employee of his right to full indemnity for wrong suffered at the hands of his employer or those for whom the employer is responsible. It deprives the employer of the right to make use of labor except upon condition that he pay the workman or his dependents arbitrary sums in the event of accident, and it prohibits the employee from selling his labor except upon condition that he give up his right to be compensated for the consequences of the employer's fault, receiving only such arbitrary sum as the legislature has seen fit to grant him.

APPARENT EXCEPTIONS TO THE PRINCIPLE OF NO LIABILITY WITHOUT FAULT

The Attorney General has referred to various instances of what he considered the imposition of liability without fault. The first instance suggested was the responsibility of the master for the act of his servant. That doctrine, whatever its explanation or origin, was a part

of the common law long before the adoption of our Constitution.

Nor is this a liability created without fault. The doctrine merely places the responsibility for the wrongful act of the servant upon the master as well. The furthest possible extension of the doctrine of *respondeat superior* by doing away with the fellow-servant rule, assumption of risk, and making the master responsible to all persons for all damages caused under any circumstances by the fault of his servant, falls far short of the imposition of an absolute liability irrespective of fault, or the imposition upon one person of liability for damages suffered by another person solely through his own fault.

Reference was made by the Attorney General to sections 4585 *et seq.* of the U. S. Revised Statutes (now repealed) providing that there should be collected from every vessel 40 cents per month for every seaman employed on the vessel, the money to be used for the relief of sick and disabled seamen. The tax laid by these sections while payable by the master of the vessel was a tax upon the seamen for the benefit of the seamen, the master being authorized to retain the amount of the tax from their wages.

Statutes such as the one before this Court in *St. Louis & San Francisco Ry. Co. v. Matthews*, 165 U. S. 1, making railroads liable without regard to negligence for damages caused by fire, present only an apparent exception to the rule. The railroad company was made liable only for its own acts. It was liable only for property destroyed by fire communicated from its locomotive engines, not for the acts of strangers or of the adjacent property owner.

The statute in effect treated the acts of the Railroad Company in communicating fire by their engines as acts of trespass for which they were liable to third parties whose property rights were thus invaded.

The real purpose of such statutes, as is pointed out in *Atchison, Topeka, etc., R. R. Co. v. Matthews*, 174 U. S. 96, 98, is

"to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is 'caused by the operating' of the road."

Especially may this high degree of care be exacted of railroad companies to which the State has given the right of eminent domain and who can therefore operate their fire-scattering instrumentalities against the will of others owning property alongside their right of way.

But whatever the present justification of the rule of liability for escaping fire and regardless of whether it now fits into our scheme of law, the real explanation of the doctrine is historical. It is an early common law doctrine, which seems to exist in England even to-day, except as clearly altered by statute. *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 6. Liability for fire irrespective of negligence, therefore, was a part of "the law of the land" long before the adoption of the constitution, and the imposition of such a well-recognized liability was properly held not to be a taking of property without due process of law.

Reference was made to the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, upholding the constitutionality of the civil

damage act making a landlord who knowingly leases his premises for saloon purposes liable for losses resulting from intoxication caused by the sale of liquor by his lessee. The act was passed as its title indicates "to suppress intemperance, pauperism and crime". As the Court pointed out, the liquor traffic was one which the Legislature "may not only regulate, but it may prohibit it" (p. 520). Possessing that power the State might prohibit the leasing of buildings to be used for selling liquor, or if it chose, instead of prohibiting leases for such purposes, might allow them only upon condition that the lessor indemnify those suffering damages through the sale of the liquor on the leased premises.

Another case relied upon was *Chicago, R. I. & P. Ry. Co. v. Zerneck*, 183 U. S. 582, where a state statute made every railroad company liable for personal injury to passengers while being transported over its road.

That statute, Section 3 of the act under which the Railroad Company was incorporated provided:

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

This Court said, at page 588:

"We think plaintiff-in-error is precluded from objecting to the rule of liability expressed in section 3. That rule of liability was accepted by plaintiff-in-error as a part and as a condition of its charter. * * * That liability, we repeat, plaintiff-in-error accepted with its incorporation, and cannot now complain of it."

Reliance is placed by the defendant-in-error upon the principle allowing maintenance and cure to a seaman falling sick or becoming injured in the service of a vessel. *The Osceola*, 189 U. S. 158. This is a contract liability; it arises out of the provisions of the seaman's contract of employment. The contracts and services of seamen have always been considered exceptional in character. As was said by Mr. Justice Brown in *Robertson v. Baldwin*, 165 U. S. 275, 282:

"The contract of a sailor has always been treated as exceptional and involving to a certain extent the surrender of his personal liberty during the life of the contract."

The peculiarities of conditions at sea are such as to justify a different relation between master and servant from that obtaining on land. The right of the master to place in irons a seaman who refuses obedience could hardly be urged in defense of a state statute allowing an employer on land to place in irons an employee refusing obedience and the existence of this right in nowise weakens the force of the constitutional guaranty of liberty. Whatever may be the explanation of this principle, it was a part of the maritime law long before the adoption of the constitution.

The liability of the husband for the torts of the wife is another illustration not of liability imposed without fault, but of responsibility for fault being placed upon one who would not ordinarily be deemed responsible. The historical explanation of this doctrine is largely based upon the fiction of the identity of the husband and wife and the presumption, which, perhaps, accords less with the facts to-day than it did when the doctrine

originated, that the wife acts under the command or coercion of her husband. This liability, too, antedated the constitution.

The Attorney General refers to the case of *Rylands vs. Fletcher*, 3 H. L. 330, perhaps with the idea that an analogy may properly be drawn between the maintenance of a reservoir and the carrying on of a business. As expressed by the late Dean Thayer in an article on Liability Without Fault, 29 Harvard Law Rev. 801, 802, note 3:

"The conception is perhaps that the person who sets in motion an uncontrollable or dangerous agency—an agent, a wild animal, ponded water, a business (under the Workmen's Compensation Acts), a dangerous condition of premises—is held responsible for what is proximately caused by the agency, rather than proximately by himself."

Dean Thayer while apparently thinking Workmen's Compensation Acts not beyond the constitutional power of legislatures, expressed his disapproval of the principle of *Rylands vs. Fletcher*, and concluded:

"One who is little disposed to adopt the view that the power of the legislature in this matter is taken away by the constitution may yet so far agree with the Court of Appeals of New York in *Ives vs. South Buffalo Railway Co.* as to the fundamental proposition of the common law which links liability to fault" (p. 815).

The doctrine of *Rylands v. Fletcher* has been quite generally disapproved in this country as the Circuit Court of Appeals for the Second Circuit pointed out in *Actieselskabet Ingrid v. Central R. Co. of New Jersey*, 216 Fed. 72, 77.

Even if the mere conduct of an ordinary lawful

business could properly be considered as analogous to the keeping of wild animals or the maintenance of great reservoirs upon one's property, *Rylands v. Fletcher* and the cases which have followed it would not serve as an authority in support of the Compensation Law. In all such cases there is found an obligation which has been violated. And this is true of nearly all the cases which are cited in justification of imposing liability without fault. Thus, the keeper of wild animals is under an obligation not to allow the animals to escape and injure his neighbors; the person who maintains a reservoir upon his property is under an obligation not to allow the water to burst out and injure others; the railroad company is under an obligation not to allow fire to escape from its engine and set fire to the property of others. In such cases, for special and exceptional reasons, liability may be imposed without fault, but only where there has been a breach of some obligation. But no liability could be imposed upon the owner of the reservoir because a person had been drowned while swimming in the reservoir, nor is the keeper of a wild animal responsible for injuries to a person who voluntarily places himself in proximity to the cage. In each case the reason is that there is no obligation with respect to that particular injury.

It is not claimed that there is any obligation upon the employer to see to it that his employees are not injured. He must provide a safe place in which they may work, safe tools and appliances, and adopt such precautions as may be imposed upon him by common law or statute; but neither common law nor statute has declared that any duty or obligation rests upon an employer to see to it

that his employees sustain no injury. Even were such a statute enacted, if it did not confine itself to matters over which the employer might conceivably have some control, it would clearly be so unreasonable as to be invalid.

It is clear, however, that the Compensation Law proceeds upon no such theory. It imposes liability not only irrespective of negligence or fault on the part of the employer but also irrespective of the breach or violation of any obligation or duty resting upon the employer. It has nothing whatever in common with statutes or decisions imposing liability for wrongs however arising, and unless it can be justified as an out and out taking of property, it must fall.

COMPULSORY INSURANCE IS NOT A JUSTIFICATION OF LIABILITY
WITHOUT FAULT

The Court of Appeals laid considerable stress upon the insurance feature of the present law, not only in attempting to distinguish its decision in the *Ives* case, but as in itself a justification under the principles laid down by this Court in *Noble State Bank v. Haskell*, 219 U. S. 104. The approval by this Court of the compulsory insurance system among banks created by the law under consideration in that case seemed to the Court of Appeals to make it reasonably certain that this Court would sustain the present law.

Before considering the *Haskell* case it may be observed that the insurance feature of the Workmen's Compensation Law is a mere incident to the primary purpose of the law which is the imposition upon the employer of liability without fault. This is apparent from the lan-

guage of § 10 of the law entitled "Liability for compensation":

"Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation * * *"

and of § 50, entitled "Security for payment of compensation":

"An employer shall secure compensation to his employees in one of the following ways * * *"

The purpose of requiring insurance except in cases where the employer is able to furnish "satisfactory proof to the commission of his financial ability to pay such compensation for himself" is obviously to safeguard the employee, and not to distribute the burden imposed upon the employer.

But even were the law designed and calculated to afford protection to the employer by the establishment of a State insurance fund in which he is permitted to insure, or, if he is unable to make a satisfactory financial showing, is required to insure, still the constitutional objections to the scheme are in no way answered by any principle laid down in the *Haskell* case.

The law under consideration there applied only to corporations of Oklahoma, whose charters were subject to alteration and repeal (p. 110). The business to which the law applied—banking—has always been regulated in the public interest, and this Court held that this regulation could extend even "to prohibition except upon such conditions as it [the State] may prescribe". As was

pointed out on the motion for rehearing (219 U. S. 575, 580) :

"In this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition of keeping on from corporations created by the State."

This plaintiff-in-error is a Kentucky corporation. The State of New York cannot alter, amend or repeal its charter. As its sole business in this State is interstate commerce, the State cannot prohibit its carrying on that business absolutely, nor upon such conditions as it might choose to prescribe. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *West v. Kansas Natural Gas Co.*, 221 U. S. 229.

Laying aside these considerations, however, the *Haskell* case is far from a decision in favor of this legislation. The insurance scheme considered in that case had for its object the payment by banks of their just debts. The banks were required merely to go into a scheme of mutual co-operation for the guarantee to the depositor of the payment of those just obligations. There is no intimation that those banks could be required to contribute premiums to a fund to be used for pensions to bank clerks or to aid depositors who had met with misfortune. Yet the Court of Appeals defends the compensation law as a scheme "to secure injured workmen * * * from becoming objects of charity" (p. 21). There is no suggestion that an invalid obligation attempted to be imposed upon the banks would be made valid by the fact that this obligation was not required to be paid by one bank in one lump sum, but, by means of an

insurance scheme, was to be paid by all of the banks in small installments.

If the law now under consideration confined itself to the establishment of a system of compulsory insurance among employers against their liability for injuries caused to employees by the negligence of their employers some support might be found in the *Haskell* case. It is submitted, however, that that case affords no basis for the reasoning in a circle adopted by the Court of Appeals in attempting to justify the imposition of liability without fault because insurance is required against such liability.

The law upheld in the *Haskell* case did not create an unknown obligation. The device, as this Court observed, was a familiar one: "It was adopted by some states the better part of a century ago, and seems never to have been questioned until now" (p. 112). The *Haskell* case was in no way intended to indicate a departure from the principles theretofore laid down by this Court (p. 580). But the liability created by this law is one hitherto unheard of in any state or country having constitutional guarantees.

THE POLICE POWER

The immediate purpose and effect of the law are to take money from the employer in order that the money may be used to relieve the employee from the loss which he has sustained. This it is sought to justify under the police power as promoting the public welfare.

Under the police power the State may regulate and restrict the use of property and the enjoyment of personal liberty even though there may result an incidental

taking of property. It may also under the police power enforce duties and obligations, although an incidental taking of property may result therefrom.

Thus this Court has held that the police power of the state extends to the enactment of measures providing "a reasonable incentive for the prompt settlement without suit of just demands". *Yazoo & Miss., etc. v. Jackson Vinegar Co.*, 226 U. S. 217, 219; *Missouri K. & T. Ry. Co. v. Cade*, 233 U. S. 642; *Kansas City Ry. Co. v. Anderson*, 233 U. S. 325; *Seaboard Air Line v. Seegers*, 207 U. S. 73. But it is equally well settled that the state cannot penalize the non-payment of what is not a valid obligation. *Chicago M. & St. P. Ry. Co. v. Polt*, 232 U. S. 165; *St. Louis I. M. & S. Ry. Co. v. Wynne*, 224 U. S. 354.

Nor can a carrier be required to furnish scales which are not necessary for transportation purposes, although they are of value to the public and promote the welfare of the community. *Great Northern Railway Co. v. Minn.*, 238 U. S. 340.

The state may prohibit contracts in derogation of regulations lawfully established, *Chic., B. & Q. Ry. v. McGuire*, 219 U. S. 549; but cannot prohibit under the police power the making of contracts that conflict with no public interest. *Truax v. Raich*, 239 U. S. 33.

Bankers may be required to give bond to pay their just debts, *Engel v. O'Malley*, 219 U. S. 128, or may be forced before hand into a scheme of mutual co-operation to pay their just debts, *Noble State Bank v. Haskell*, 219 U. S. 104, 112; but statutes will be struck down where their object or effect is to require the payment of money where there is no legal responsibility. *St. Louis I. M. & S. Ry. Co. v. Wynne*, 224 U. S. 354.

Laws limiting the hours of labor are justifiable, but only when the Court can see that they are passed in the interest of and reasonably subserve the public health. *Muller v. Oregon*, 208 U. S. 412; *Lochner v. New York*, 198 U. S. 45, 59.

But where the primary object of a statute is an interference with the normal exercise of personal liberty and property rights, it cannot be sustained. *Coppage v. Kansas*, 236 U. S. 1.

Applying the principles laid down in these cases it is apparent that the Compensation Law can be sustained under the police power only by a disregard of the limitations which have hitherto been imposed upon the exercise of that power.

The taking of property in this case is a direct taking of property as property; it is not a mere incident of a regulation or restriction of the use of property. The primary object of the statute is to take the property of the employer in order that with the property so taken the losses suffered by the employee may be made good. Where there is such a direct taking, not merely a taking incidental to a regulation imposed by statute, it is unnecessary to consider the public purpose which the statute is supposed to subserve, nor whether the action of the legislature in seeking to effectuate that purpose is reasonable or arbitrary. Such considerations arise where an incidental taking results from a regulation adopted for the accomplishment of some object thought to be for the public good; but regardless of the object incidentally effectuated, property may not be directly taken for its own sake, that is, for the mere purpose of acquiring the property, as this law attempts to do.

This distinction is well stated in *Coppage vs. Kansas*, 236 U. S. 1, 18, where this Court said:

"We need not refer to the numerous and familiar cases in which this court has held that the [police] power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in *Holden v. Hardy*, 169 U. S. 366, 391; *Chicago, B. & Quincy R. R. v. McGuire*, 219 U. S. 549, 566; *Erie R. R. v. Williams*, 233 U. S. 685; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the States to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his 'financial independence'. In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare', and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment."

While the police power may justify an incidental injury to rights of private property resulting from the

exercise of governmental powers lawfully and reasonably exerted for the public good, it can never justify the taking of private property without compensation where the public welfare is to be promoted by a transfer of the property taken to some person or class whose acquisition of such property it is thought will promote the public welfare. As this Court said in *Missouri Pacific Railway Company vs. Nebraska*, 164 U. S. 403, 417:

"The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of the Amendment of the Constitution of the United States."

The Attorney-General urges that modern industrial conditions make it difficult, if not impossible, to judge correctly the causes of a large proportion of accidents and that it is impossible to form a correct judgment without such expense and delays as will defeat justice. Granting the soundness of the Attorney-General's criticism of present conditions, the remedy lies in legislation aiming to correct these abuses, to do away with unnecessary delays in the Courts, to bring about more correct judgments and more complete justice; not legislation doing away with the very concept of justice itself. Even assuming that employers as a class will be required to pay under the compensation law no more than they were required to pay in the settlement and defense of personal injury suits before the passage of the law, and assuming that the compensation paid to workmen for injuries under the law is equal to or greater than the amount of compensation which they received before the passage of the Work-

men's Compensation Law, can this be urged in defense of injustice to the individual employer, whose whole plant and whole fortune are wiped out by the payments that must be made because of the carelessness of an employee, a stranger or because of *vis major*? Or does this justify depriving a needy and worthy employee of the right to full and complete indemnity for injuries sustained through the wrong of the employer?

What justification can there be for depriving the employee, injured by the fault of the master, of his right to indemnity for the damages he has suffered? The workman by the compensation law is deprived of all right to recover for pain and suffering. He is deprived of his right to recover his full loss of earnings. He is wholly deprived of the right to damages for the first two weeks' disability. The fundamental principles of our law oppose such a result.

The employer is not here urging the grievance of the employee. The Court of Appeals correctly pointed out:

"Exemption from further liability upon paying the required premium into the State fund is an essential element of the scheme and if the Act be unconstitutional as to the employee, the employer would be deprived of that exemption and thus would be directly affected by the unconstitutionality of the Act in that respect" (p. 21).

To sustain the law, therefore, it is necessary to justify the taking of property not only from the employer but also from the employee. Unless this can be done the law must fail.

That property may not be directly taken without just compensation for the property taken is a principle of natural equity which required no constitutional sanc-

tion. This Court said in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 324:

"This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of the one and the same principle.' And in *Gardner v. Newburgh*, 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to everyone. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

If it be urged that the legislature in taking away the property of the employer has given him just compensation by relieving him from the burden and expense of litigation and limiting the extent and amount of his liability, it is sufficient to say that it is not within the legislative power to determine what is "just compensation". As this Court said in *Monongahela Navigation Co. v. United States* (*supra*), quoting from the opinion in a case decided by the Mississippi Supreme Court:

"The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective

conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so" (p. 327).

THE RESULTS OF COMPENSATION LAWS

As a result of the accident in the present case the employer must pay to each of the two children an annuity of \$101.92 until they reach the age of eighteen, and to the widow an annuity of \$305.24 so long as she lives and does not remarry. The widow was twenty-nine years old at the time of the accident and had an expectancy of thirty-five years. If compensation is paid to her throughout the period of expectancy and compensation is paid to the children until they reach eighteen years of age, the employer will have paid out over \$13,000.

Had Jensen been permanently totally disabled instead of being killed, and had he lived to reach the age of seventy, the law would have required of the employer an outlay of about \$16,000. With his wages \$100 a month and his age twenty-five, the outlay would be about \$36,000—taken from the employer against whom no suggestion of fault has been made.

Turning to other compensation systems, we find that workingmen's insurance in Germany in 1911 cost "almost exactly 2,000,000 marks daily", a sum which Dr. Ferdinand Friedensburg, for more than twenty years President of the Senate in the Imperial Insurance Office, says "can now be characterized by nothing short of monstrous" (*Friedensburg, The Practical Results of Workingmen's Insurance in Germany*, p.

19). Under the new Government Insurance regulation it is said that Germany must "soon reckon with a burden of about 1,250,000,000 marks each year, laid upon our industrial activity simply and solely for purposes of social insurance" (*id.* p. 20). In 1911 the cost of insurance against accidents (resulting in more than four weeks' disability) in Austria amounted to nearly \$8,000,000, and applying the Austrian system at the same premium to employers in the United States the cost of workmen's compensation would amount to over \$382,000,000 per annum (*Bulletin No. 157, U. S. Dept. of Labor, Industrial Accidents Statistics, March, 1915, p. 148*).

We point out this result of the law to show the magnitude of the taking of property which is sought to be justified. It is not a slight restriction upon the employers' method of doing business that this law imposes; it is not a negligible contribution that is exacted from the employer: the law lays upon the employer burdens which the Legislature itself considers so onerous that it requires, except in exceptional cases, that the burden be insured.

The Attorney-General has urged in justification of the law that it tends to promote safety of workmen. It is difficult to see how this assertion is to be sustained. The law requires the employer to take no steps looking to the safety of workmen. It requires the employer ordinarily to insure. If the employer does insure he has no immediate interest in the safety of his employees, and in accident prevention. The law not only imposes no duty of care upon the master, but it removes a chief incentive to his exerting himself to safeguard his workmen.

The ascertainment of the causes of accidents and the fixing of responsibility becomes no longer of importance. The occasion of and the incentive to the formulation of rules of conduct after investigating accidents is done away with. This, again, cannot but militate against the interest of safety.

The workman as well as the employer is relieved from the consequences of his own fault and wrongdoing. A minor accident is no longer to be dreaded, and if possible avoided. Relieving the workman from responsibility for his own fault and wrongdoing cannot but result disastrously.

These consequences of a compensation system are matters not merely of theory, but of fact, as the experience of other countries under workmen's compensation laws shows.

Statistics prove that the number of accidents has greatly increased under compensation laws. In Switzerland the number of accidents per thousand workmen was 38.31 in 1888, and has steadily increased to 93.15 in 1902 (computed from Table 2, *Frankel & Dawson, Workmen's Insurance in Europe*, p. 75).

Austria's experience is similar. Accidents among full time workers have steadily risen from 19.49 per thousand in 1890 to 55.07 in 1900, 63.19 in 1906 (*id.* p. 123). The period of Italian experience given shows an increase of accidents per thousand insured from 72 in 1903 to 105 in 1905 (*id.* p. 88).

German experience for new, compensated accidents (of over 13 weeks' disability) shows an increase from 2.03 per thousand workmen insured in 1888 to 5.63 in 1900 and 6.77 in 1907 (*id.* p. 103). Reported accidents

in Germany have increased from 28.04 per thousand workmen in 1888 to 44.76 in 1900 and to 52.83 in 1911 (*H. G. Villard, Workmen's Accident Insurance in Germany*, pp. 21-22). French experience in 1904-7 shows an increase of from 52.8 to 96.1 accidents per thousand workmen (*Report of Proceedings of U. S. Employers' Liability and Workmen's Compensation Commission of 1912*, p. 1431).

Statistics show an increase under compensation laws in the percentage of accidents attributable to the fault of the workman. In the German Official Estimate of the responsibility for accidents in 1887, 26.56 out of every 100 accidents were allocated to the injured workmen's own fault. This proportion increased to 41.26 out of 100 accidents attributable to the workmen's own fault in 1907 (Figures for 1887, *24th Annual Report, Commissioner of Labor*, p. 1137; for 1907, *92nd Bulletin of Labor*, p. 64).

One of the great dangers of workmen's compensation laws is the increasing amount of malingering. Offering anyone the opportunity to shirk and still obtain wages or the equivalent of wages without work is leading him into almost irresistible temptation. The law provides that "no benefits * * * or insurance of the injured employee * * * shall be considered in determining the compensation or benefits to be paid under this chapter" (Sec. 30). The workman's income from compensation, accident insurance and benefits paid by labor unions and other benefit societies will not infrequently be greater than his income when working full time. Furthermore, the workmen's compensation is computed upon a basis of 300 working days in the year (Sec. 14). It is matter

of common knowledge that in most of the trades industrious workmen average far less than 300 working days per year. It is thus as profitable for many workmen to rely on compensation as to work. Nor does compensation bear any relation to the actual earnings of the injured workman. Compensation is based upon earning capacity irrespective of whether the workman has seen fit to exercise his capacity. Thus an idler receives under the law compensation based upon what he could earn in the employment paid at the average rate and working 300 days a year, although he has never done a stroke of work before the day he was injured.

Dr. Otto Naegeli, Professor at the University of Tübingen, in his inaugural address delivered February 13, 1913, called attention to the effect of the Swiss compensation law in bringing about an increase of imaginary ills, particularly at times when unemployment was common. (*Naegeli, Concerning the Effect of Legal Rights to Compensation in Cases of Neurosis*, p. 17.)

Accident statistics show a much greater increase in the number of minor disabilities than in the number of fatal or serious accidents, and the constantly increasing length of time required for recovery in cases of minor disabilities reflects the tendency toward imaginary ailments and malingering. German writers have pointed out the grave dangers inherent in a system of workmen's compensation and have deplored the attendant loss of moral fiber. *Ludwig Bernhard, Undesirable Results of German Social Legislation* (1914).

The Industrial Accident Board of Massachusetts in its *First Annual Report* (1914), p. 44, felt it its duty to call to the attention of the Legislature "the conditions which

have shown, especially in Europe, a tendency to sap the vital elements of character and check the growth of the qualities of the highest value in national development," the chief of which conditions was malingering.

The same Board also points out as "one of the logical but most unexpected developments of the workmen's compensation act * * * the throwing of aged and infirm employees out of industry * * *." The conclusion is that "the State which has thrown these employees out of work will eventually be asked to make provision for them, although the danger of acts providing for non-employment insurance and superannuated insurance is so obvious that they need not be here discussed" (p. 44).

SECOND POINT

THE NEW YORK WORKMEN'S COMPENSATION LAW IMPOSES A DIRECT AND UNCONSTITUTIONAL BURDEN UPON THE INTERSTATE COMMERCE TRANSACTED BY THE PLAINTIFF-IN-ERROR.

The workmen's compensation law contains in section 114 a provision dealing with interstate commerce, and the Court of Appeals held that this section literally construed,

"makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce" (p. 18).

The Court of Appeals felt, however, that a broader application of the law was intended, and it applied the

law in this case, although both employer and employee were engaged solely in interstate commerce. This construction placed by the Court of Appeals upon the law must, of course, be accepted in this Court.

The business of this employer in this State consists solely of interstate commerce. The number of its employees and the amount of their payroll have a direct relation to the business. It is a rough measure of the amount of interstate business transacted by the Company in this State. The effect of exacting the payment of compensation to its injured employees without regard to any violation of its duties or obligations, but solely in pursuance of the State's views of what will be conducive to the general welfare, is to lay a tax upon the interstate commerce transacted by this employer. It is none the less a tax if it be, as the Court of Appeals said,

"A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity" (p. 21).

The exaction from an interstate carrier of arbitrary sums of money whether in the form of compensation awards to its employees, or of premiums to the State insurance fund based upon its payroll, does not differ in principle from the exaction of a fixed amount for each employee. That such a statute would be unconstitutional is shown by the decision of this Court in *Adams Express Co. v. N. Y.*, 232 U. S. 14, 33. There an ordinance of New York City exacting the annual payment of \$5 "for each express wagon" and 50 cents "for each driver" was held unenforceable as to interstate commerce.

Nor does it matter for what purpose the money ex-

acted is to be used. The Workmen's Compensation Law provides for the payment by the employer of the expense of medical and surgical treatment. The tax laid upon the master of twenty-five cents for each seaman by the statute considered in *People v. Brooks*, 4 Den. 469, was to be used for a marine hospital, but the statute was held unconstitutional despite the laudable purpose for which the money was to be used, and this Court in the *Passenger Cases*, 7 How. 283, held that a similar tax could not be laid upon the master for each passenger.

State statutes, the effect of which is to tax interstate business, have been uniformly condemned by this Court regardless of the manner in which the tax was attempted to be laid. This Court has struck down not only statutes laying taxes directly upon articles of commerce or upon the physical instrumentalities of commerce, but also statutes whose effect was to tax and thereby burden interstate commerce in any way.

In the case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336, this Court said:

"Taxing the transportation either by its tonnage or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress."

In *Galveston, Harrisburgh & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, this Court held unconstitutional a tax on the gross receipts of a railroad company which, though its line lay wholly within the State of Texas, was engaged in interstate commerce.

The burden imposed upon the employer here in respect of his employees engaged in interstate commerce is quite

as direct a burden upon that business as a tax upon the gross receipts of that business.

Property taxes may, of course, be laid upon the property of those engaged in interstate commerce as well as upon the property of others. Likewise, the State may require the payment of a license tax as a condition precedent to granting a privilege which is within its power to grant or refuse. Beyond this the State cannot go in the imposition of taxes upon those engaged in interstate commerce. Other taxes than these have invariably been held to constitute a direct burden upon interstate commerce, and have been uniformly condemned by this Court regardless of the form in which they have been disguised.

Under the guise of inspection laws the States have often sought to exact contributions from those engaged in interstate commerce, but when the inspection charge was greater than such as to remunerate the State for the service performed, statutes imposing such taxes have been overthrown. For this reason this Court declared unconstitutional a meat inspection law in *Brimmer v. Rebman*, 138 U. S. 78, and a similar law in *Minnesota v. Barber*, 136 U. S. 313; a tax for the inspection of telegraph poles, in *Postal Telegraph Cable Co. v. Taylor*, 192 U. S. 64, and an Oyster Inspection Law in *Foote v. Maryland*, 232 U. S. 494.

Many of the States have felt that peddlers, hawkers and others following similar pursuits were nuisances and that the welfare of the State required that they be licensed, but such statutes when applied to those engaged in interstate commerce have again and again been condemned.

Brennan v. Titusville, 153 U. S. 289;

Welton v. Missouri, 91 U. S. 275;

Caldwell v. N. Carolina, 187 U. S. 622;
Rearick v. Pennsylvania, 203 U. S. 507;
Dozier v. Alabama, 218 U. S. 124;
Crenshaw v. Arkansas, 227 U. S. 389.

The States are prohibited not only from taxing interstate commerce, but also from imposing any direct burden upon such commerce. As was said in *The Minnesota Rate Cases*, 230 U. S. 352, 396, where all the authorities upon this subject are very fully collected:

"If a State enactment imposes a *direct burden* upon interstate commerce it must fall regardless of Federal legislation."

In *Heyman v. Hays*, 236 U. S. 178, 186, this Court said:

"The protection against the imposition of direct burdens upon the right to do interstate commerce, as often pointed out by this Court, is not a mere abstraction affording no real protection, but is practical and substantial and embraces those acts which are necessary to the complete enjoyment of the right protected."

Obviously it is essential for those engaging in the carriage of merchandise and passengers from other states to hire workmen and to pay wages, and the exercise of this right is necessary to the complete enjoyment of the right to engage in interstate commerce. Yet when the employer uses workmen in the movement of interstate freight the compensation law exacts from the employer engaging in interstate commerce certain sums to be used for the support of injured workmen and their dependents. Such a requirement seems a much more direct burden than many which the states have attempted to impose, but which this Court has unhesitatingly condemned.

If we look to the decisions to trace the distinction between direct burdens which may not be placed by the States upon interstate commerce and those incidental regulations which lie within the sphere of the States until Congress speaks, we find the test is this: Does the statute impose merely regulations in aid of a duty, or does it impose absolute obligations beyond the carrier's duty?

In *Atlantic Coast Line R. R. v. Mazursky*, 216 U. S. 122, this Court said at page 133, quoting from *Western Union Telegraph Co. v. James*, 162 U. S. 650:

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

In sustaining a statute of Michigan making telegraph companies liable for the full damages sustained by the sender for negligent delay or non-delivery of messages, this Court said of the statute in *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 416:

"It imposes no additional duty. It gives sanction only to an inherent duty. It declares that in the performance of a service, public in its nature, that it is the policy of the State that there shall be no contract against negligence. The prohibition of the statute, therefore, entails no burden."

A State statute cannot place upon a carrier an obligation to trace interstate shipments and to inform the shipper where and under what circumstances the freight was lost, and a statute of Georgia attempting to impose such an obligation was declared unconstitutional in the case of *Central of Georgia Railway Company v. Murphey*, 196 U. S. 194. At page 203 it is said:

"This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce."

States may impose upon interstate carriers the duty of furnishing reasonable accommodation for local needs, but they cannot go further and require interstate carriers to furnish facilities after local requirements have been met. *Chicago, Burlington & Quincy R. R. Co. v. Railroad Commissioners of Wisconsin*, 237 U. S. 220. It is beyond the power of the State to require a railway company to deliver interstate cars to a consignee on a private siding beyond its right of way, for such a law imposes "a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce." *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 561. The attempted imposition of an absolute obligation upon a railway company to place cars for consignees within 24 hours after arrival was held to impose a direct burden and to be unconstitutional as to interstate shipments. *Yazoo & Mississippi Valley R. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1. Nor can the State impose upon a railroad company a requirement absolute

except in case of strike or other public calamity to furnish cars on a specified day for interstate transportation, for the imposition of such an absolute obligation with the resulting penalties from a failure which might occur from circumstances wholly beyond the control of the carrier imposes a direct burden upon interstate commerce. *Houston & Texas Central R. R. Co. v. Mayes*, 201 U. S. 321.

The language of this Court in the *Mayes* case brings out clearly the distinction between regulations calculated to encourage the performance of duties and statutes imposing absolute obligations upon those engaged in interstate commerce. The Court said at page 329:

"While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other livestock, we think an absolute requirement that a railroad shall, furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, wash-outs or other unavoidable consequences of heavy weather."

Even were the law a valid exercise of the police power, it would still be unconstitutional if it lays a direct

burden upon interstate commerce. When certain ordinances of New York City dealing with expressmen were applied to those engaged in interstate commerce and were sought to be sustained upon the ground that the ordinances were adopted in the exercise of the police power, this Court said in *Adams Express Co. v. N. Y.*, 232 U. S. 14, 31:

"It is insisted that, under the authority of the state, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce."

Accordingly this Court has sustained legislation as valid under the police power, *Powell v. Pennsylvania*, 127 U. S. 678, although overthrowing the same legislation as far as it applied to interstate commerce. *Schollenberger v. Pennsylvania*, 171 U. S. 1. See also *Mugler v. Kansas*, 123 U. S. 623, and *Leisy v. Hardin*, 135 U. S. 100.

The Court of Appeals reasons that the Workmen's Compensation Law does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relation between employer and employees in this State. The regulation of a relation, however, may impose a direct burden upon commerce. It might have been said in the case of *International Text Book Co. v. Pigg*, 217 U. S. 91, that the statute which was held unconstitutional there did not purport directly to regulate interstate commerce, but was merely passed for the purpose of regulating the relations between foreign corporations and those doing business with them and who might want to sue them in the State of South Dakota. In the case of *Hall v. De Cuir*, 95 U. S. 485,

it might have been urged that the statute of Louisiana did not purport directly to regulate interstate commerce, but merely regulated the relation between carrier and passengers, white and black; but the Court held that statute unconstitutional as applied to interstate commerce.

It is urged in support of the law that the cost to the employer of paying compensation awards and providing the medical and surgical treatment required by the law becomes a part of the cost of the business, and that this burden may be shifted upon the consumer. Indeed the amendment to the Constitution of the State of New York under which the Compensation Law was enacted provides, Article I, section 19, that

"all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

The business of the Southern Pacific Company is that of carrier engaged in interstate commerce. Congress alone has power to regulate the remuneration which that Company shall receive for the carriage which it performs. Obviously the State of New York can no more determine what shall be a factor in determining transportation charges or what shall be "a proper charge in the cost of operating the business" than it can fix the rates of carriage for the freight which Jensen was unloading. Nor can the State of New York shift to the inhabitants of other states the cost of caring for impoverished employees by casting the burden upon the interstate com-

merce carrier, even if that burden may be shifted by the carrier.

The Court of Appeals referred to certain cases involving State regulations which so incidentally affected interstate commerce that the State action was upheld. It is, of course, conceded that the State may impose upon all, including those doing interstate business, the duty of taking precautions for the safety of their workmen and may impose obligations upon the employer for breach of such a duty. The State may sanction by statute the moral duty of its citizens to refrain from wrongfully causing the death of other persons and may allow the recovery of damages for breach of that obligation, and such duties may be imposed upon those engaging in interstate commerce as well as those engaging in other business. *Sherlock v. Alling*, 93 U. S. 99. In the interest of the public health, the State, which has always had supervision over matters of local health, may require vessels coming into its ports to submit to an examination and may require the vessel owner to pay for the service received. *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455. Likewise, a State may require that diseased cattle may not be brought into the State, and for the purpose of carrying out that policy may require the inspection of cattle, the expense of such inspection to be paid by those seeking to bring in the cattle. *Reid v. Colorado*, 187 U. S. 137.

Another case referred to by the Court of Appeals, *Erie R. R. Co. v. Williams*, 233 U. S. 685, upholding the New York Two Weeks' Pay law, involved only a trivial interference with the employer's business, and if it

affected interstate commerce at all, it did so indirectly and trivially.

These cases upon which the Court of Appeals relied are far from meeting the situation at bar. The State may properly impose reasonable rules of conduct and may provide incentives for the performance by the interstate carrier of duties inherent in its calling without conflicting with the commerce clause of the Constitution of the United States. When the State goes further, however, and enacts legislation which imposes absolute obligations, beyond such duties, and directly takes property, it is taxing and burdening interstate commerce and such legislation cannot stand.

THIRD POINT*

THE NEW YORK WORKMEN'S COMPENSATION LAW DENIES THIS PLAINTIFF-IN-ERROR THE EQUAL PROTECTION OF THE LAWS BECAUSE, ALTHOUGH IT COMPLIES WITH THE COMPENSATION LAW, IT IS NOT FREED FROM FURTHER LIABILITY TO WORKMEN INJURED ON SHIPBOARD, BUT REMAINS LIABLE TO SUITS IN ADMIRALTY.

Employers other than those of men working on shipboard, upon complying with the law, are given complete immunity from suits to recover for disabilities sustained by their workmen in the course of the employment. After providing in Section 10 that compensation for injuries

*The discussion of this point by the Court of Appeals is found in its opinion in *Clyde Steamship Company*, plaintiff-in-error, v. *Walker*, defendant-in-error, reargued herewith.

shall be paid according to the schedules of the law, it is provided in Section 11 that

"the liability prescribed by the last preceding section shall be exclusive, except * * * an employer fail to secure the payment of compensation * * *"

The exclusiveness of the law is a most vital feature. As the Court of Appeals said in this case:

"Exemption from further liability upon paying the required premium into the state fund is an essential element of the scheme" (p. 21).

We shall show that the liability prescribed by the law is not exclusive as to this employer, but that it and other employers of men who work on shipboard remain liable to suit in admiralty and are thereby denied the protection accorded to all other classes of employers.

The law in terms applies to workmen engaged in the operation of New York vessels wherever the vessel may go (Sec. 2, Group 8) and to those engaged in longshore work. The seaman's work is always upon vessels and the longshoreman's work is largely done on shipboard.

When an accident happens on shipboard a claim arises within the admiralty jurisdiction of the Courts of the United States and suit may be brought in admiralty against the ship owner, the vessel, or the employer of the workman. *Atlantic Transport Company v. Imbrovck*, 234 U. S. 52.

Accordingly, a seaman or a longshoreman injured while upon a vessel may have recourse to the District Courts of the United States for the enforcement of his right which will there be determined in accordance with the principles of the maritime law of the United States, unaffected by either state statutes or decisions.

In the case of *The Lottawanna*, 21 Wall. 558, after speaking of the provision of the Constitution conferring admiralty and maritime jurisdiction upon the Courts of the United States, this Court said at page 575:

"The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states. * * *

The jurisdiction conferred upon the courts of the United States is jurisdiction to hear the controversy and determine it according to the accepted principles and rules of maritime law. This is well shown by the case of *Workman v. New York City*, 179 U. S. 552.

There the owner of a vessel filed a libel against the City of New York to recover the damages caused by the negligence of those in charge of a fireboat belonging to the Fire Department of the City. At law there could have been no recovery because the City was at the time engaged in a governmental function. This Court held that the owner of the vessel had a right of action in admiralty, however, and could recover in the courts of the United States having admiralty jurisdiction the damages which he had sustained. The Court said at page 557:

"The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject matter is within the cognizance of such courts and when

the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decisions therein."

This proposition the Court held was unfounded. At page 558 it said:

"The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent."

See also *The Max Morris*, 137 U. S. 1; *The Thode Fagelund*, 211 Fed. 685; 218 Fed. 251.

It follows that whatever power a State may have to take from the injured workman his common law right of action, it cannot take from him his cause of action in admiralty, *The Fred. E. Sander*, 208 Fed. 724; *The Rosalie Mahony*, 218 Fed. 695, 698. In the former case it was held that a longshoreman injured on shipboard could maintain an action in admiralty, although the

Workmen's Compensation Law of Washington provided for the payment of compensation.

"regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, * * *."

The New York Court of Appeals fully recognized that the remedy provided in the Compensation Law did not exclude the right of the injured employe to resort to his remedy in admiralty. It said (Walker Record, p. 17) :

"The state cannot interfere with the admiralty jurisdiction (*The Lottawanna*, *supra*; *Workman v. New York City*, 179 U. S. 553), and if the act be valid an injured employee may in certain cases have a choice of remedies, one under the act and another in admiralty precisely as before he could choose between his common-law remedy and the right to proceed in admiralty."

What then is the result of this law? The employer of men who work on land is protected from suit and from being compelled to make other payments than those required by the law. The employer of men working on shipboard, although he pays the premiums and fully complies with the law, is not protected. The injured employee, if the accident was due to negligence of the vessel or her owners, will sue in admiralty and recover damages. Every one of the workmen hurt on shipboard may resort to the admiralty courts and, although the employer has made the outlay required by the law for his injured employees, they may obtain decrees in admiralty which the employer must satisfy. Such a discrimination between the employers of those working on vessels and employers of those working on land is purely

arbitrary and it results in denying to employers of men on shipboard the equal protection of the laws.

It was to avoid this result that the Supreme Court of Washington in the case of *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, held that seamen did not come under the Washington Workmen's Compensation Law, although one of the occupations which in terms was subject to the law, and from which premiums were required, was the operation of steamboats. The Court said at page 257:

"If companies operating boats upon Puget Sound are within the act, then they may be compelled to pay the percentage of their pay rolls specified, and yet be subject to a right of action in admiralty; while other persons or corporations engaged in a hazardous business not covered by admiralty law would be completely protected against the pursuit of any other remedy or proceeding. The owner of a steamboat, if he should pay the percentage of his payroll specified, and his injured seamen would pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens. If the act were given this construction, it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the constitution of the United States which provides that no state shall make or enforce any law which shall 'deny to any person within its jurisdiction the equal protection of the laws.'"

To avoid an interpretation of the law which would render it void as denying the equal protection of the laws the Court refused to apply the law to the employer of seamen.

The Maryland Compensation Law has been held inoperative as to seamen in *Clausen v. Baltimore & Carolina Steamship Co.*, decided July 2, 1915, by the State Industrial Accident Commission of Maryland.

A discrimination similar to that presented in the case

at bar was held to invalidate a compensation law in the case of *Cunningham v. Northwestern Imp. Co.*, 44 Montana, 180 (119 Pac. 554). The law there provided that mine owners should contribute to the State one cent per ton of coal mined, and miners should contribute one per cent. of their gross earnings to a fund administered by the State for making compensation to injured miners. The Court held that as the act did not give an exclusive remedy, but left the employer liable to suit, it violated the clause of the Constitution of the United States guaranteeing the equal protection of the laws. At page 221 the Court said:

"The duty to make payments as provided in Section 2 is absolute and unconditional. It can be enforced by appropriate action. But, after full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case. No provision is made for reimbursement in whole or in part. The injured employees of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled to pay twice. He has fully paid his assessments under the act, and is also obliged to pay damages. This fact is so palpable as to be needless of discussion. The act in this regard is not only inequitable and unjust, but clearly illegal and void, as not affording to such employer the equal protection of the laws. * * *

"The manner in which the equal protection of the laws shall be afforded to the operator is, of course, for the legislative body to determine; but some method must assuredly be provided to protect him from double payments. The act in its present form is, in this regard, so repugnant to all ideas of equity and equality that it must, we think, appeal to every right-thinking person, on the most cursory examination, as unjust. It was to guard against such legislation as this, as we apprehend, that the framers of all American constitutions guaranteed to the citizen the equal protection of laws."

The New York law is subject to the same objections as those rendering the Montana act unconstitutional. Although the employer may fully comply with the terms of the law, he is not exonerated from liability for injuries sustained on shipboard. He does not obtain what the Court of Appeals has characterized as "an essential element of the scheme." He may still be sued and compelled to pay damages. No provision is made for his reimbursement in whole or in part. The injured employees of one steamship company may choose to accept compensation; those of another steamship company may elect to proceed in the admiralty courts. The employer whose workmen work on land, upon compliance with the terms of the act, is freed from all liability for disabilities to his workmen. The employer of men whose work takes them on shipboard, although he pays premiums to the State Fund or to the insurance carrier, furnishes medical attention to the injured workmen, and fully complies in all respects with the law, remains liable to suit in admiralty. This discrimination is without any rational basis; indeed, no reason for such a discrimination is suggested. As applied by the Court of Appeals the law denies employers of men working on shipboard the equal protection of the laws guaranteed to all persons.

It has been suggested that employers of men working on shipboard can by self insurance avoid double payments and thereby escape this discrimination. But freedom from double liability is not assured by this employer carrying its own risk. If the employee obtains a decree in admiralty and then presses his claim for compensation, upon what ground can the Commission refuse to make an award?

Furthermore, this employer is entitled to the same rights under the compensation law as any other employer. It must have the right to pay premiums into the State fund and secure the same protection as such payments afford to all other employers. Nothing less is "equal protection of the laws."

The Court of Appeals suggests that employers of workmen injured on shipboard were, before the compensation law, subject to two remedies—a suit at common law and a suit in admiralty; that the compensation law merely works a substitution of compensation for common law liability and that the admiralty remedy remains as before. Before the compensation law there was but one liability—a liability based upon fault—although there were two remedies, since the workman had his option as to what forum he should use to enforce that liability. Under the present law the employer is subject not only to two remedies, but to two differing liabilities. The workman has the option of choosing not only the forum where he will enforce his rights, but of choosing also the law which he will have enforced. If he is injured through the fault of a stranger, *vis major*, or through his own negligence or misconduct he will elect to take compensation under the compensation law. If he is injured through the fault of the vessel, the shipowner or the stevedore he will bring suit in admiralty, not to obtain mere compensation, but to recover full indemnity for the injuries which he has sustained. Surely such a difference in the position under the law, of employers of men working on land and employers of men working on shipboard, can not be dismissed by saying that there has been a mere substitution of one remedy for another.

The Court of Appeals reasons that this employer is not denied the equal protection of the laws because the failure of the legislature to make the remedy given in the compensation law exclusive as to workmen injured on ship board results not from the deliberate intent of the legislature, but from the lack of power of the legislature to grant this exemption.

But can a law, operating unequally and unjustly upon different persons, be justified by the assertion that the legislature, which put the statute into operation, could not prevent a discrimination under the statute? Is a statute any less objectionable because the legislature is unable to remedy inequalities brought about by its operation than because it refuses to do so? We find in the authorities no support for such a proposition.

The Constitution does not prohibit the States from denying *as far as they can* the equal protection of the laws. If the State cannot avoid offending against this provision of the Constitution in enacting a certain law, it must refrain from enacting that law. If enacted, the law and not the Constitution must give way.

FOURTH POINT

THE NEW YORK WORKMEN'S COMPENSATION LAW AS APPLIED TO THIS CASE INFRINGES UPON THE EXCLUSIVE ADMIRALTY JURISDICTION OF THE UNITED STATES.

Section 2, Article 3 of the Constitution of the United States provides:

"The judicial power shall extend * * * to all Cases of admiralty and maritime Jurisdiction."

Section 24, paragraph 3 of the Judicial Code of the United States (Act of March 3, 1911; 36 Stat. L. 1091) provides:

"The district courts shall have original jurisdiction as follows: * * * Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Section 256 of the Judicial Code provides:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several states: * * * Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

It is not disputed that the present case comes within the admiralty jurisdiction of the United States. *Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 52. Such jurisdiction is by the provisions of the Judicial Code made exclusive except in so far as there may be saved to suitors "the right of a common law remedy, where the common law is competent to give it". The question therefore arises whether the remedy provided by the Workmen's Compensation Law is such a common law remedy as the common law is competent to give. The mere fact that the remedy is created by statute does not of course prevent its being a common law remedy within the meaning of the saving clause. *Steamboat Co. vs. Chase*, 16 Wall. 522. But it does not follow that every remedy which may be created by state legislation is to be considered as included within the term "a common law remedy".

In order that it may be said of a statute that it gives

a common law remedy, the statute must provide for the redress of a legal grievance, and the machinery for providing that redress must be generally similar to the machinery known to the common law. The Workmen's Compensation Law satisfies neither of these requirements.

The Compensation Law does not purport to redress a legal grievance. Compensation is awarded "without regard to fault". Nor is the machinery provided of a kind known to the common law or which a common law court would enforce. The provisions of the Compensation Law in this respect are not unlike those of the Mexican law considered in *Slater vs. Mexican Nat'l R'y Co.*, 194 U. S. 120, of which this Court said:

"It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings—a decree which contemplates periodical payments and which is subject to modification from time to time as the circumstances change * * * The present action is a suit at common law and the court has no power to make a decree of this kind contemplated by the Mexican statutes" (p. 128).

In *The Fred E. Sander*, 208 Fed. 724, 727, Judge Neterer said:

"How then can it be said that legislation by a state providing for the abolishment of all common law remedies in cases of personal injuries to servants, and establishing, in lieu thereof, a remedy purely statutory and unknown to the common law, comes within the clause 'saving to suitors in all cases the right of a common law remedy; where the common law is competent to give it?'"

When the provisions of the Compensation Law creating a state insurance fund, resort to which shall constitute

the employee's exclusive remedy, are considered, it becomes even clearer that the Compensation Law does not create a common law remedy within the saving clause of the Judicial Code.

The State Industrial Accident Commission of Maryland, in dismissing the claim of a seaman arising under the Maryland Compensation Law, said:

"The reasonable conclusion to be drawn from all the authorities which have construed the saving clause in question, is that the remedy provided in the case of occupational injuries arising from Acts 1914, Chapter 800, is not a common law remedy within the meaning of that clause. It, therefore, follows that the admiralty and maritime jurisdiction of the Federal Courts in respect of remedies for injuries in the instant case precludes this Commission from taking concurrent jurisdiction in the premises." *Clausen vs. Baltimore & Carolina SS. Co.*, decided July 2, 1915 (unreported decision).

Furthermore, the remedy provided by the State law cannot be enforced where Congress has prescribed a different measure of liability. The Limited Liability Act of the United States provides that:

"The liability of the owner of any vessel * * * for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." *U. S. Revised Statutes*, Sec. 4283.

The Supreme Court Rule in Admiralty, LVI, governing the proceedings to be taken by the owner of a vessel for limitation of liability pursuant to the statute provides:

"In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability,

or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act)
 * * *

Congress has thus expressly legislated as to the liability of the owner of a vessel and this Court has prescribed the method whereby he may not only secure a limitation upon his liability, but may also contest the existence of any liability.

In so far as it is sought to apply the Workmen's Compensation Act to the liability of a ship owner, it is in direct conflict with the law of Congress, which is supreme. The Compensation Act attempts not only to create a liability on the part of the ship owner without fault, but to impose a limitation upon the ship owner's liability which bears no relation whatever to the limitation fixed by Congress. The two acts cannot stand together. Such was the conclusion reached by the Supreme Court of Washington in *State ex rel. Jarvis vs. Daggett*, 87 Wash. 253, 259:

"The Congress of the United States having passed a law which limits or measures the extent of the liability of the owner of a vessel to a workman who has sustained an injury, the legislature would not have the power to fix another and different standard or measure."

FIFTH POINT

CONGRESS BY THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908 HAS DEALT WITH AND ASSUMED EXCLUSIVE JURISDICTION OVER THE FIELD OF COMPENSATION PAYABLE FOR INJURIES RECEIVED BY THE EMPLOYEE OF A COMMON CARRIER BY RAILROAD WHILE BOTH EMPLOYER AND EMPLOYEE ARE ENGAGED IN INTERSTATE COMMERCE.

The Court of Appeals recognized that if the compensation law occupies a field which Congress has entered, the state law can not govern; indeed, it pointed out that the legislature in section 114 of the law had in effect said that

"it did not intend to enter any field from which it had been or should be excluded by the action of the congress of the United States" (p. 19).

The only question, then, is whether Congress has entered the field occupied by the state law.

By the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65) Congress has provided that

"Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The law by its terms applies to "every common carrier by railroad", upon two conditions. Those conditions are

that at the time of the accident the employer be engaging in interstate commerce, and that the employee also be engaging in interstate commerce. The facts found by the Commission show that all of these conditions were present. The Commission found that the employer was a common carrier by railroad; that the employer was engaging in interstate commerce at the time the accident happened, and that the employee was at the same time likewise engaging in interstate commerce.

The Court of Appeals was of opinion that it was essential to the application of the Federal Act that the accident should occur in the operation of a railroad. The statute does not so provide. It contemplates that the railroad company shall have other branches of its service than rail lines. It specifically provides that the carrier shall be liable when the employee is injured by defects or insufficiencies "in boats, wharves, or other equipment". Congress thus included under the Federal Employers' Liability Act employees of railroad companies injured while engaged in interstate commerce even though their work was upon a boat, as in the present case.

The Federal Employers' Liability Act has been uniformly applied in the lower Federal Courts to injuries received on vessels so long as the employer was a common carrier by railroad. *The Passaic*, 190 Fed. 644; *Erie R. R. Co. v. Jacobus*, 221 Fed. 335. Where the vessel is "not a part of a railroad or railroad system, nor a common carrier", the Act, of course, does not apply. *The Pacnee*, 205 Fed. 333.

In *The Passaic*, an employee of the Erie Railroad Company was killed by the escape of steam into the fireroom of the ferryboat *Passaic*, which plied between New York

and New Jersey. Upon suit being brought the Company took proceedings in admiralty to limit its liability. The Court held the Federal Employers' Liability Act the proper law to apply in determining whether the employee had a cause of action against the Railroad Company, saying at page 649:

"It may be assumed that the transportation of freight and passengers by the railroad company from Jersey City across the Hudson River into New York State is interstate commerce. The employees upon the ferry boat were employees of the railroad company, therefore, engaged in an occupation within the interstate commerce jurisdiction of the Congress and the United States courts (*Pedersen v. D., L. & W. Railroad* (C. C.) 184 Fed. 737), and the law of 1908 is applicable thereto. It is expressly limited to the activities of a carrier by railroad. The maintenance of a ferry may be within the charter powers of a railroad company, and it cannot be said that the voyage is a carriage by rail. But the statute does not limit the liability of the carrier to its track or train service. It expressly refers to defects or negligence in boats, wharves, and other equipment, provided they and the injured party are engaged in interstate commerce."

This decision was affirmed on appeal (204 Fed. 266), the Circuit Court of Appeals for the Second Circuit saying that it fully concurred with the decision of the District Court except upon a point of jurisdiction, not material to the question considered here.

The Circuit Court of Appeals for the Third Circuit in the *Jacobus* case (*supra*) held that an employee injured on board a tugboat of the Erie Railroad Company could maintain an action under the Federal Act. In that case the Court said at page 338:

"If the expression 'common carriers by railroad', as used in the title of the act, is open to debate, the clear expression of the act itself with respect to carriers' lia-

bilities in connection with the instrumentalities of railroad operation, including by enumeration boats and wharves, discloses that the scope of the act was intended to include the liability of carriers for their negligence, or that of their employees, occurring upon or in connection with those instrumentalities while engaged in interstate commerce."

The Act has been given a wide application under the decisions of this Court. It has been applied even in cases where the employee was not participating in an interstate operation, but was merely taking steps looking to the repair of instrumentalities used in both interstate and intrastate commerce. *Pedersen v. D., L. & W. R. R. Co.*, 229 U. S. 146.

Since the decision of the case at bar by the Court of Appeals that Court has held in the case of *Winfield v. New York Central R. R. Co.*, 216 N. Y. 284, that the Federal Employers' Liability Act occupied the field only of injuries occasioned by negligence; that there is no conflict between the Federal act and the workmen's compensation law, at least so long as the state legislation is applied to accidents occurring in interstate commerce only when not occasioned by negligence. Whether the employer may show the facts necessary to bring the case within the Federal Employers' Liability Act, as construed by the Court of Appeals, the Court did not determine, saying at page 296:

"If a claim is made under the state statute against an employer and the employer pleads that the employee was injured in interstate commerce as a result of the employer's negligence the question will be presented whether the employer shall be permitted to urge his negligence to defeat the claim of his employee. That question is not now presented and we think discussion of it should be reserved until it arises."

The result of this decision is that in administering a law purporting to require compensation to be made irrespective of fault the Commission, preliminary to determining whether it has jurisdiction of a claim, must make an inquiry into the question of fault, the very matter which it was the intention of the law to eliminate. Before deciding whether it may entertain the claim for compensation, the Commission must determine the merits of the controversy under the Federal Employers' Liability Act. Accepting the Court of Appeals' construction of the law, we look to the decisions of this Court and the principles there laid down to see whether or not the law conflicts with federal legislation enacted pursuant to the Commerce Clause.

The decisions of this Court show that in enacting the Federal Employers' Liability Act Congress assumed exclusive jurisdiction of the whole field of the indemnification of employees of railroad companies injured while both master and servant are engaged in interstate commerce.

The action of Congress in providing under what circumstances the railroad company shall be liable is tantamount to enacting expressly that the railroad company shall not be liable to its employees under other circumstances. The field occupied by Congress in passing the Federal Employers' Liability Act was not simply the field of liability (that is, *recovery* by the employee, in the specific case), but was the field of the carrier's whole responsibility in respect of injuries and death received in the employment.

In *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226

U. S. 571, 576, the Court said of the Employers' Liability Act that

"With respect to the *responsibility* of interstate carriers by railroad to their employees injured in such commerce after its enactment it had the effect of superseding state laws upon the subject." (Italics ours.)

In the case of *St. Louis & Iron Mountain Ry. Co. v. McWhirter*, 229 U. S. 265, 275, the Court instances as a Federal question which it can review:

"the right of the defendant to be *shielded from responsibility under that statute* [Federal Employers Liability Act] because when properly applied no liability on his part from the statute would result." (Italics ours.)

In the case of *Toledo, St. Louis & Western R. R. Co. v. Slavin*, 236 U. S. 454, 457, the Court said:

"When the plaintiff brought suit on the state statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was engaged in interstate business."

The case of *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, leaves no room for doubt on this point. In that case an engineer engaged in interstate commerce was injured by the bursting of a water gauge. The Federal Employers' Liability Act makes the railroad company liable for injuries resulting from a defect in the company's engines or appliances when "due to its negligence". The North Carolina statute, in terms at least, makes railroad companies liable for injuries suffered "by any defect in the machinery, ways or appliances of the company". The Trial Judge expressed the notion that the duty of the defendant was absolute with respect

to the safety of the place of work and of the appliances for the work. Of this the Court said at page 501 :

"In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the Act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded. *2nd Employers Liability Cases*, 223 U. S. 1, 55."

Later the Court said :

"It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carriers to its employees for defects and insufficiencies not attributable to negligence."

Had the Federal Act not occupied the whole field of liability for injuries in interstate commerce, whether through negligence or not, the lower court's instructions would have been correct. If the state statute had not been superseded, then if there was no negligence and so no liability for the defect under the Federal Act, the Court could properly have applied the state statute imposing the absolute duty to furnish a safe appliance. But in the view of this Court, the Federal Act had taken possession of the whole field of liability of employer to employee for injuries occurring in interstate commerce.

Congress has not only enacted under what circumstances the railroad company shall be liable, but it has also provided what damages may be recovered, *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59; the persons entitled to damages, *Gulf, Colorado & Santa Fe Ry. Co.*

v. *McGinnis*, 228 U. S. 173; *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, 229 U. S. 156, and the manner in which the damages are to be distributed. *Taylor v. Taylor*, 232 U. S. 363. No action for death to an employee engaged in interstate commerce can be brought against the railroad company except within the time provided by Congress. *Atlantic Coast Line R. R. Co. v. Burnett*, 239 U. S. 199.

The fact that there is no liability imposed by Congress in favor of certain relatives of a deceased workman or that Congress has made no provision for the recovery of other than pecuniary damage in death cases, does not leave the field of legislation in these respects open to the states, for "the act of Congress creates the only obligation that has existed since its enactment". *Atlantic Coast Line R. R. Co. v. Burnett*, 239 U. S. 199, 201.

It seems to have been the view of the Court of Appeals that the state law is inoperative only in so far as it conflicts in a given case with affirmative declarations of Congress. The Hours of Service Act Cases, *Eric Railroad Co. v. New York*, 233 U. S. 671 and *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, show this view to be unsound and that Congress by refraining from action may as effectually withdraw a field from state legislation as though it had enacted affirmative measures. Thus in the former case when Congress had provided that telegraph operators should not be permitted to work more than 9 hours in a day a state law which purported to prescribe an 8 hour day was held invalid. This Court viewed the action of Congress in prescribing a 9 hour day as an expression by Congress of its judgment as to the proper extent of such restrictions. The Federal la

involved there had not gone into effect at the time of the occurrences out of which that case arose, but this Court held that the State law could not operate in the time between the passage of the Act and the time when it went into effect, because the action of Congress in postponing the operation of the law was tantamount to providing that in the meantime the subject should be free from state interference.

In *Southern Ry. Co. v. R. R. Comm. of Indiana*, 236 U. S. 439, 448, where an Indiana statute relating to grab irons on railroad cars was declared unconstitutional, this Court said:

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

Directly contrary to the decision of the Court of Appeals in the *Winfield* case are *Smith v. Industrial Accident Commission*, 26 Cal. App. 560 (147 Pac. 600) and *Staley v. Illinois Central R. R. Co.*, 268 Ill. 356 (109 N. E. 342). The *Winfield* case was followed in New Jersey in *Winfield v. Erie R. R. Co.*, 88 N. J. L. 619, now in this court on writ of error.

We submit that the injury in the case at bar falls within the Federal Employers' Liability Act; that recourse must be had to that Act alone to determine the obligation of this plaintiff-in-error, and that the Workmen's Compensation Law cannot apply irrespective of the presence or absence of negligence on the part of the employer.

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LAST POINT

THE JUDGMENT SHOULD BE REVERSED WITH COSTS.

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FILED

JAN 8 1917

JAMES D. MAHER

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

No. 280.

SOUTHERN PACIFIC COMPANY,
Plaintiff-in-error,

vs.

MARIE JENSEN,
Defendant-in-error.

ERROR TO THE SUPREME COURT, APPELLATE
DIVISION, THIRD DEPARTMENT OF THE STATE
OF NEW YORK.

et filed by permission of the Court on behalf of Marie Jensen,
Defendant-in-Error, by Christopher M. Bradley (as amicus curiae)
representing the Industrial Accident Commission of the State of
California, 525 Market Street, San Francisco, California.



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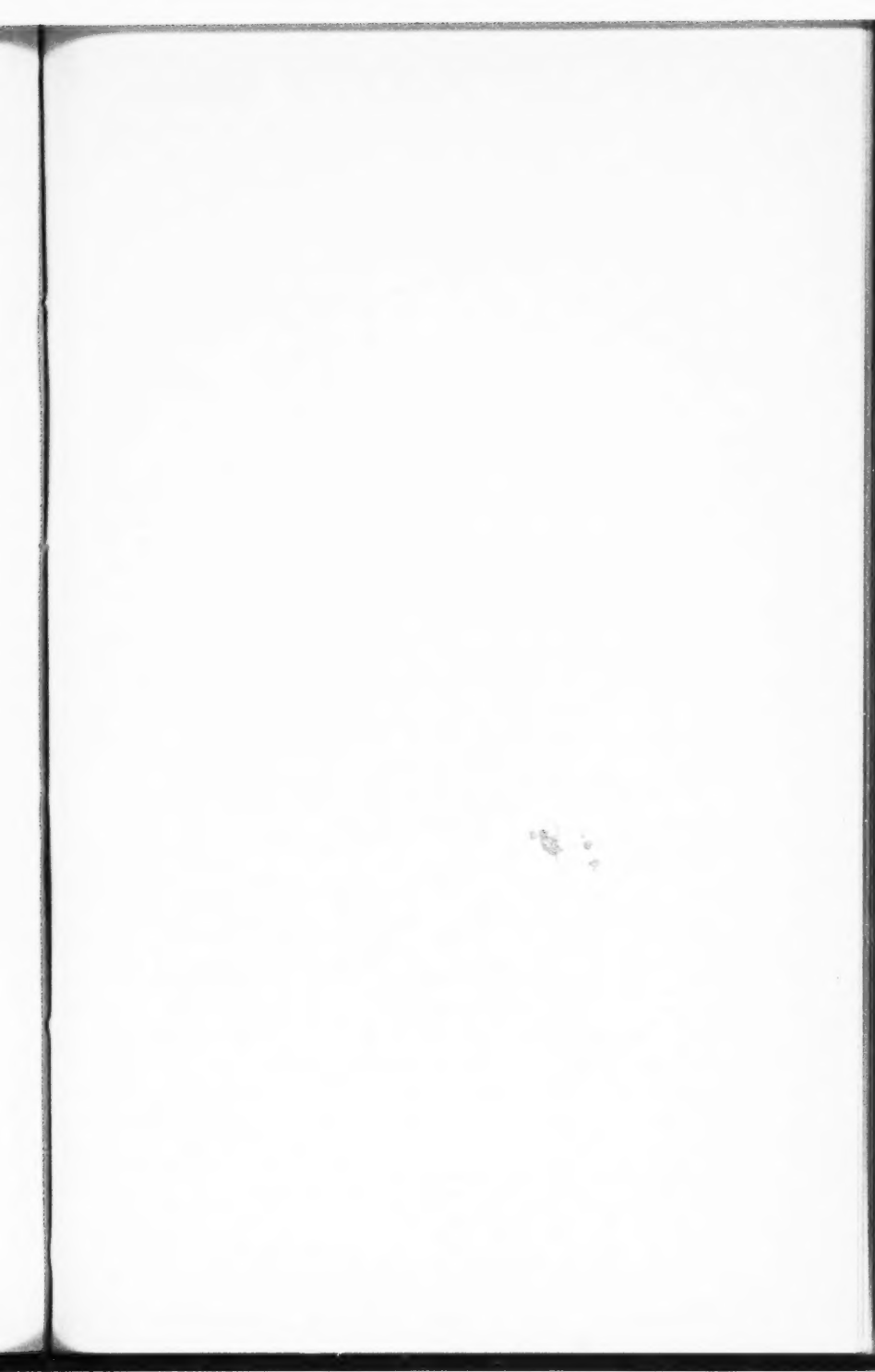
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IN THE
Supreme Court of the United States,

OCTOBER TERM, 1916.

SOUTHERN PACIFIC COMPANY,
Plaintiff-in-error,

vs.

MARIE JENSEN,
Defendant-in-error.

No. 280.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT OF THE STATE OF NEW YORK.

Brief filed by permission of the Court on behalf of Marie Jensen, defendant in error, by Christopher M. Bradley (as *amicus curiae*), representing the Industrial Accident Commission of the State of California.

Introductory Statement.

This brief is presented by counsel at the request of the INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA. The California official and public interest in the case before the Court is identified by reference to these several facts and conditions:

(The italics are supplied.)

1. *Similarity of the laws of New York and California.*

The Workmen's Compensation Insurance & Safety Act of California (Chap. 176, Laws 1913) is a thorough-going compulsory statute of much broader scope in its application to the field of industry than is the New York compulsory statute. Both acts are candidly and directly compulsory, without resort to presumptive election and coercion by manipulation of the familiar common law defences. The New York act is of limited application; it extends only to industries scheduled in it as hazardous. The California act is of general application, covering the whole field of industry, with a few named exceptions. New York compels insurance coverage or security for the payment of compensation. California does not, but leaves these matters of insurance and security wholly optional.

The present California act is senior in enactment and effective date to that of New York. It went into effect on the first day of January, 1914, and has therefore been in operation for a period of three full years. There is the same sanction for both of them, viz., the police power, and amendments to the respective State Constitutions. Both acts have been held valid by the state courts against attacks alleging them to be violative of the Federal and State Constitutions. The California decisions are:

Western Indemnity Co. v. Pillsbury, et al., 151
Pac., 398;

Western Metal Supply Co. v. Pillsbury, et al.,
156 Pac., 491.

No appeal has been prosecuted from the decisions of the California Supreme Court in these cases, and inasmuch as there is involved in the instant case the question of the validity of a compulsory compensation statute, the decision of which by this Court may affect vitally the Cal-

California legislation or the principle upon which it is based, permission has been asked to assist the Court in the consideration of the problem.

2. *Jurisdiction in maritime cases.*

California, like New York, is a maritime state. Many injuries, some fatal, occur upon ships in navigable waters of the state. And so the question arises as to jurisdiction over claims for indemnity. Is the jurisdiction of the United States Courts, sitting in admiralty, exclusive, or is there concurrent jurisdiction, admitting the operation and administration of the compensation statutes without admiralty. This question is incidentally involved in the case at bar, inasmuch as the claimant's decedent lost his life on shipboard, while employed on a ship which was lying in navigable waters of the state of New York. Should the Court determine in favor of the validity of the New York legislation, then it appears to be necessary to the final disposition of the cause to determine this question of jurisdiction, for the reason that claimant's decedent was indisputably employed under a maritime contract, and she would therefore have opened to her the admiralty forum in which to present her case, subject to limitations encountered there in like cases.

The plaintiff in error contends that cognizance of the claim may be had only in admiralty, and that to admit the operation and administration of the compensation statute contravenes two constitutional provisions, viz., that investing jurisdiction of admiralty and maritime cases in the United States Courts, and that inhibiting the denial of equal protection of the laws, because, it is asserted under the latter head, employers operating ships are twice exposed to defending claims if concurrent jurisdiction is sanctioned, while the compensation remedy is the only one applicable to claims against employers generally who come within the terms of the statute.

The Issues.

These contentions will be made here:

1. That the compulsory Workmen's Compensation Law of the State of New York is valid.
2. That the operation and administration of the Workmen's Compensation Law are not excluded by the constitutional investiture of jurisdiction over maritime matters in the courts of the United States sitting in admiralty.
3. That there is no denial of equal protection of the law.

PART I.

Preliminary Consideration of Constitutional Provisions.

It seems appropriate to invite the Court's attention to a more thorough survey and a broader view of the Constitutional provisions involved in the consideration of this cause than is suggested in the usual cause. While it is true that full consideration must be given to the force of the prohibitions found in Section 1, Article XIV, its application in this cause can be made only by reference to its proper meaning and its proper relation to other pertinent parts of the Constitution.

The language which has received more attention in decided cases than any other provision of the Constitution is this: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

It is a single phrase in a brief section of an amendment covering several other related matters looking to a broad definition of the status and rights of national citi-

zens, about which there could not have been great doubt except for a new class of such citizens but recently added when the amendment was adopted, and whose status as citizens must have been fixed. The amendment was not proposed by Congress until after the Civil War, 1866, and was not proclaimed as ratified until 1868. It immediately follows Article XIII, adopted December 18, 1865, prohibiting slavery. There had been no amendment of the national organic law for a period of 61 years, that is since September 25, 1804, relating to a purely political matter.

It is thought proper, by way of limiting the force of the amendment in this case, to refer to the early (1872) decision of this Court in the *Slaughter House Cases*, 16 Wall., 36, 71, where Mr. Justice Miller said:

"We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizens from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

In short, the amendment was wholly designed as a shield; its manipulation as a sword to strike down welfare legislation enacted by the states in the legitimate exercise of reserved powers was never contemplated.

The expression "due process of law" has been colloquialized to such an extent that the very words are readily taken to suggest wrongful deprivation of property. It is familiar to encounter the view that the thing prohibited to the states is the deprivation of property, and also a common experience to hear it said that due process of law means a jury trial in all cases, if not waived; or that it means the fixed constitutional right to have applied some familiar plan of adjective law.

It is respectfully urged that no violence is done to this clear expression by construing it thus:

"A State may deprive of property, conditioned that provision for adequate legal procedure must be made to afford the opportunity to show cause why the substantive rights of ownership and possession should not be directly disturbed."

It was said in *People ex rel. v. Supervisors*, 70 N. Y. 228:

"Due process of law simply requires that a party shall have his day in court; the legislature may take away the particular remedy and give a new one."

"A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken L. & I. Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

Walker v. Sauvinet, 92 U. S. 93 (23 L. ed.) 679.

In *Pearson v. Yewdall*, 95 U. S. 296, this Court said:

“And in the statute now under consideration, ample provision is made for an inquiry as to damages before a competent court and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the state. This is due process of law, within the meaning of that term as used in the federal constitution.”

Of course, it is not contended that a citizen's property may be taken away by a mere form, arbitrarily, and without the administration of justice. He must be heard in due procedure for that purpose. He must have the opportunity to defend his substantive right not to be deprived of his property, by endeavoring to show that a State law is arbitrary, utterly unreasonable, extravagant, not a proper exercise of the police power, or any other defence he may have. But if there is due process provided for determining these questions, and used in the determination of them, and they go against him, there is an end of the matter.

Compensation laws, whether elective or compulsory, fix a liability to indemnify, irrespective of fault or negligence. Given adequate procedure to determine the question of the application of the law to a concrete case, there remains the single inquiry whether a deprivation of property, irrespective of fault or negligence, is within the legitimate power of the state sovereignty, reasonably tested in the light of public necessities and the general welfare going to make up the social public policy of the state. It is obvious that there is not a word in this amendment about negligence or fault.

The state has great and far-reaching power to deprive of property under many heads. Great powers in this respect, as in others, are constitutionally reserved to the states and to the people, the people of the states,

as well as the people of the United States. This power is even recognized, though in negative terms, in Section 1 of Article XIV, in the very language, just considered. It is established expressly by reference to Article X adopted December 15, 1791, 77 years prior to the adoption of Article XIV. It is essentially a part of the original instrument. (*Slaughter House Cases*, 16 Wall. 36, 67.)

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The power to deprive of property, then, is not prohibited to the states, but is expressly reserved to them, qualified only by the mandate of the use of due process of law. If the object to be effectuated is a legitimate one, then it seems plain that the legislature of a state, or the people of a state, may adopt their own means for accomplishing the object.

“It could not be seen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and reservations and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. *Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its power, as its own wisdom, and the public interests should require.*”

Martin v. Hunter's Lessees, 1 Wh. 304, 326.

Inasmuch as the legislation being tested before the Court must find its broader and greater sanction in reserved state powers, more particularly the police power of the state, and is referred to, both popularly and judicially as general welfare legislation, it is pertinent to

direct attention to the language of the preamble of the Constitution, expressing the full purpose and intent of all its provisions:

“We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

The compensation law is an expression of the deep-rooted and constantly growing sentiment for the establishment of what has been termed social justice to meet modern conditions of industrial life,—“establish justice” in that field. So it may well be suggested here, that if the Court finds weight in the considerations put forward to show the urgent necessity for the kind of relief worked by a law of this character, there is disclosed the express design to have the provisions of the Constitution regarded and construed to favor it more strongly than would be the case under the general rule of presumptive validity.

Of greater force is the expression “promote the general welfare.” Every compensation law enacted has been put on the statute books for that stated purpose. That compensation laws are deemed to have the most proximate relation to the general welfare is evidenced by the fact that two-thirds of the states and some of the territories have enacted them in one form or another, following the lead of all the civilized nations of the world. The title of the California law opens with, “An act to promote the general welfare of the people of this state,”

* * *

Compensation laws are in force in nearly all of the great industrial and thickly populated states, among them New York, Massachusetts, Pennsylvania, New

Jersey, Ohio, Illinois and Michigan. These are not all compulsory laws, but, where they are not, they contain coercive provisions tantamount to compulsion.

In asking the court to consider a restricted definition of the expression "due process of law", counsel is mindful of the extended definition of the words developed in the course of judicial decision, but asserts with confidence that the fuller meaning of the term is again restricted and must yield to the proper weight given to reserved powers in the states, including the police power, to be hereinafter outlined. That this view is sound is evidenced by a short review of a few of the many decisions disclosing an interpretation consistent with it.

The only decided case holding a compulsory compensation law unconstitutional as violative of due process of law is that of *Ives vs. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431.

The Court of Appeals placed its decision squarely upon the ground that the compulsory compensation law of New York, because it fixed the liability upon the employer irrespective of his fault, was condemned by the state constitutional provisions forbidding the deprivation of life, liberty or property, without due process of law, and then proceeded to suggest that such legislation could stand only if the people of the state should amend the state constitution to authorize the legislation.

While the decisions of that great court are entitled to the highest respect, both its reasoning and its conclusion have been generally and severely criticized, and the decision has been squarely repudiated by the Supreme Court of the State of Washington in the case of *State ex rel. Davis-Smith Co. vs. Clausen*, 65 Wash. 156, 117 Pac. 1101, in a decision also passing upon the validity of a compulsory law. The criticisms leveled at the New York decision are well represented in digest form by Professor

Freund, the eminent authority on police power as follows:

"In the present case the weakness of the court's decision is, I think, capable of demonstration. In its closing paragraph the opinion makes it plain that it rests upon the state and not the federal constitution; it speaks of 'our view of the constitution of our state,' and declines to be controlled by a possibly more liberal doctrine of the Supreme Court of the United States. In an earlier passage the opinion says, with reference to the recognized and widely prevalent sentiment in favor of a new system of liability, that the appeal must be made to the people and not to the courts. According to these statements, an amendment to the constitution of the state of New York expressly sanctioning workmen's compensation would remove all difficulty. Does the court mean to say that what is not due process to-day will be due process to-morrow; or, after a constitutional amendment, will workmen's compensation be something else than due process, and if so how shall we call the new principle that is not due process; and how will the court then dispose of the 'due process' clause of the federal constitution? Do the two clauses, expressed in exactly the same language, have a different meaning in the two constitutions, and if so, why? These are legitimate questions, which the court leaves unanswered."

No other court which has been called upon to pass upon the constitutionality of compensation laws, either compulsory or elective in form, has followed the decision of the New York court, although the same questions have been raised in all the cases appealed to state courts of last resort. The expression of the Supreme Court of Wisconsin, in the case of *Borgnis vs. The Falk Co.*, 147 Wis. 327, 133 N. W. 209, is fairly representative:

"Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be

obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office. But when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present day people and conditions?

When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation."

The following reasoning by the Supreme Court of the State of Washington is to be set over against the reasoning of the New York Court of Appeals:

"It is with regret that we are unable to set forth at length counsel's argument on this branch of the case, as any abbreviation of it is at the expense of its cogency and force. To do so, however, would unduly lengthen this opinion. The argument is based on two fundamental ideas: The one, that the act created a liability without fault; and the other, that it takes the property of one employer to pay the obligations of another. It must be conceded that these contentions have a basis in fact, and tha

they, on first impression, constitute a persuasive argument against the validity of the act. Since there is exacted from every employer of labor engaged in one or more of the industries termed hazardous a certain fixed sum based upon his pay roll, which is to be used to compensate employees working in such hazardous employments who receive personal injuries, regardless of the question whether the injury was because of the fault of the employer or of the negligence of the employee, it can be said that some part of the sum so collected will be paid out on injuries in which the employer is without fault; and, furthermore, since every such employer is liable to make the payments whether or not any of his own workmen are injured, and since an employer is liable under the common law for an injury to his own workmen only, it can also be said that by this act one employer is held liable for the obligations of another.

But these conditions do not furnish an absolute test of the validity of the act. In the statute books of the several states are many statutes held constitutional by the courts where liability is created without fault, and where the property of one person is taken to pay the obligations of another, and this where no compensation is made to the person who is thus made liable or whose property is thus taken, other than perhaps the bestowal upon him of some privilege. The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things? but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby? The legislature can not, of course, without violating this clause of the constitution, declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, wherever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of the people at large, no mat-

ter from whatsoever cause the menace may arise. This is done under the police power; 'the power inherent in every sovereignty . . . the power to govern men and things.'

It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the state, and is not in violation of any direct and positive mandate of the constitution. The clause of the constitution now under consideration was intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as condition of remaining members of society. In other words, the test of a police regulation, when measured by this clause of the constitution, is reasonableness, as contradistinguished from arbitrary, or capricious action."

"Due process of law" is synonymous with "law of the land" in Magna Charta and those words "were intended to protect the individual from the arbitrary exercise of the powers of government unrestrained by established principles of private right and distributive justice."

Columbia vs. Okely, 4 Wheat, 235, 244.

If the Ives case be correct, then, in the words of this Court, the exact substantive law of the last half of the eighteenth century "would be fastened upon American jurisprudence like a strait-jacket, only to be unloosed by constitutional amendment. That would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."

Twining vs. New Jersey, 211 U. S. 78, 101.

And

"It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

"This would be all the more singular and surprising . . . when we consider that owing to the progressive development of legal ideas and institutions in England, the words in Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally."

"There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it in new and not less useful forms."

Hurtado vs. California, 110 U. S. 516, 529, 531.

In *Munn vs. Illinois*, 94 U. S. 113, it was said (p. 134):

"The law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they develop, and to adapt it to the changes of time and circumstance."

And in *Holden vs. Hardy*, 169 U. S. 366, (p. 387), it was said:

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency,

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it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees as they may arise."

Courts have in many decisions, formulated definitions of the term "due process of law," in its broader signification. It has been defined no more clearly than in the case of *Ex parte Ah Fook*, 49 Cal. 402:

"Due process of law means, in each particular case, such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

This definition is amplified and brought down to date by the following:

"The rapid development of modern industries bringing into play new forms of power from wealth and combination, and the increasing complexity of civilization have already rendered necessary restrictive legislation which would have seemed intolerable to the generation nurtured in the legislative theories of Bentham. Enlightened public opinion, as reflected by our legislatures and courts, has receded from the strict doctrine of *laissez faire*, and we cannot say that a further abandonment of that position may not be advisable. It is of the utmost importance, then, not to give to the broad and simple phrases employed by the constitution in the enumeration of fundamental rights, so rigid an interpretation as will hamper the legislatures in fashioning remedies for apparent evils and abuses."

McGehee on Due Process of Law, p. 362.

It would seem, then, that the question whether or not a compensation law conforms to the requirement of due

process of law in its broader signification is about as follows: Is a law of compensation based upon settled and prevailing "principles of private right and distributive justice," or, to the extent that it seeks beneficially to extend and to apply those principles, is it "held by the prevailing morality to be greatly and immediately necessary for the public welfare"? If that question can be answered in the affirmative, a compulsory compensation law should be sustained.

Noble State Bank *v.* Haskell, 219 U. S. 104.

Of the Reasons for a Compensation Law.

The arguments which immediately follow might be more appropriately addressed to a Legislature, yet they are highly useful to disclose to the Court the considerations which actuated the legislatures, and to justify their action as an exercise of the police power, to be subsequently discussed.

Domestic Statistics.

Not more than three years ago it was necessary to rely upon information obtained from European countries to show loss experience in the industrial field due to injuries arising out of employment. Since that time statistical accounts have been kept in several states, developing an American experience. California has maintained a thoroughgoing system of tabulation, and presents a typical experience in a State not essentially industrial and where but a million men are employed,—small as compared to New York.

There were 691 employes killed in 1914, in California, 533 in 1915 and 325 during the first six months of 1916, a total of 1,549.

Permanent injury means the permanent loss of a member, or organ, or function of the human body, an impairment which is not remediable. Of these there were 1,292 in 1914, 1,264 in 1915 and 535 during the first half of 1916, a total of 3,091 crippled men, permanently impaired, and in scores of cases absolutely helpless, for permanent disability runs from one per cent. to one hundred per cent.

Temporary injury means an injury that results in loss of working time without permanent physical impairment. The loss may be for several days or several years, depending upon the seriousness of the injury. Of these there occurred 60,241 in 1914, 65,741 in 1915 and 39,409 in the six months of 1916, a total of 165,391.

The workmen killed in 1914 left 736 dependents who had looked to them for support. Of these, 241 were totally dependent widows and 348 were totally dependent children. The others were of various degrees of relationship. The children averaged 9 years of age and the widows averaged 38 years of age.

The compensation payments during the first year the law was in effect in California amounted to \$1,361,809.35, which does not, of course, include disbursements to cover future instalments in death cases and in cases where the disability payments extend beyond a year. Of the total amount paid out, nearly three-quarters of a million dollars, \$720,178.56, was paid for medical, surgical and hospital treatment. The total time lost by all employees temporarily disabled in 1914 was 695,394 days—a tremendous industrial waste.

In 1915 the wage loss created by temporary industrial injuries in California, counting only those where the loss of time amounted to more than fifteen days working time, was \$2,000,142. The total compensation paid to all injured workmen or their dependents was \$2,002,706.44, of which \$852,202.48 went for medical, surgical and hos-

pital treatment. Killed workmen left 739 dependents without means of support. Of these 247 were widows and 379 were children. The average age of the children was again nine years.

It has been asserted and demonstrated by economists and publicists that industrial injury is the third greatest cause of poverty and distress. It is asserted that industry kills in the United States between 40,000 and 50,000 persons each year, cripples more or less seriously 500,000 and injures in the neighborhood of 2,000,000 sufficiently to cause them to lose time from work.

Humanitarian Phases.

Without compensation laws, industry turned from its doors, without recompense, all save a small percentage of its wounded and those dependent upon its dead to shift for themselves as best they might, and where relief was afforded, it was not only belated but inadequate for keeping the injured and those dependent upon them from becoming objects of public or private charity.

A mature student of workmen's compensation has said:

"There is a certain line that encircles the globe. Every schoolboy knows of it. Yet, no man ever saw it, and for the very good reason that there is not really any line there. It is an imaginary line, needful only for the purposes of geographical description. The reference is to the equator.

"There is another line that runs up and down the earth, and in and out of nearly every street of every city into the homes of those who toil, wherever they are. Three-fourths of the children of men live on it, or near it, if not below it. It is known as 'the poverty line.' It is not an imaginary line. It is so real that a premature explosion, a flying missile or an infinitesimal fragment of steel blinding one, may force him and his whole family to find that line in

the dark, to sink below that line, perhaps never again to rise above it."

It was such conditions that prompted this Court to say:

"It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life or limb as great as that of a soldier in time of war."

Johnson vs. Southern Pac. Ry. Co., 196 U. S. 1.

The reasons, then, for the compensation laws are to be found in the conditions which call for their enactment.

It was not until very recently that the legislatures of many of the states and the Congress inaugurated orderly investigations into the conditions hereinafter described in part, the reasons for those conditions, and sought a remedy to work more exact justice in the adjustment of the burden of bearing the financial losses of industrial accidents as between employer and employee, and as a matter of general welfare.

Legislative Estimate.

The legislature of the State of Washington, enacting a compulsory compensation law (Chap. 74, Laws 1911, approved March 14, 1911) made this declaration in Section 1 of the law:

"The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost to the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inade-

quate. Injuries in such work, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage workers."

This is a legislative epitome of the reports of all the legislative commissions, some thirty in number, that have investigated the subject. Thirty-two states have enacted compensation legislation in varying forms as a result of these investigations and reports.

It is possible to marshal an extensive and impressive array of convincing lay opinion emanating from sources entitled to the highest respect to define to this Court the forceful reasons for departure from the old system of employers' liability based on fault and for the acceptance of the only character of remedial legislation that has been formulated and tested as a workable substitute to accomplish substantial justice between the parties and to promote the public welfare, that is, workmen's compensation. However, this phase of the matter may well be covered by reference to decided cases.

Judicial Estimate.

Shortly *before* the state of Wisconsin adopted her present satisfactory workmen's compensation law, Winslow, Chief Justice, wrote the opinion in the case of *Driscoll vs. Allis-Chalmers Co.*, 129 N. W. 401.

The plaintiff in that case was injured while working in a trench under an overhead crossing, which had been constructed for temporary use in the work being done. The foreman had engaged with the employee that the overhead crossing would not be used while the man was working underneath it. A fellow employee, using the crossing, dropped a block of wood upon the plaintiff. Holding that the proven promise of the foreman did not take from the case the doctrine of assumed risk, for the

reason that the authority of the foreman to make the promise was not shown, the court said:

"If it be said that some of these rules are archaic and unfitted to modern industrial conditions I do not disagree; in fact that has been my own opinion for long. Upon reflection it seems that this could hardly be otherwise. Principles which were first laid down in the days of the small shop, few employees, simple machinery, could hardly be expected to apply with justice to the industrial conditions which now surround us. In those earlier days the laborer ordinarily knew his fellow workmen, worked with simple machinery, and ran comparatively small risk of injury. The genius of our present remarkable industrial development requires that he carry on his patient toil in company with veritable armies of fellow men, many of whom he can neither see nor know; it surrounds him with mighty and complicated machinery driven by forces beyond his control, whose relentless strength rivals that of the thunderbolt itself, and it requires him to labor day by day with faculties at highest tension in places where death lurks in ambush at his elbow, awaiting only a moment's inadvertence before it strikes.

"The faithful laborer is worthy of his hire in these latter days as never before, but is he not entitled to more, and are not those dependent upon his labors entitled to more? When he has yielded up life, or limb, or health in the service of that marvelous industrialism which is our boast, shall not the great public for whom he wrought be charged with the duty of securing from want the laborer himself, if he survive, as well as his helpless and dependent ones? Shall these latter alone pay the fearful price of the luxuries and comforts which modern machinery brings within the reach of all?

"These are burning and difficult questions with which the courts cannot deal, because their duty is to administer the law as it is, not to change it; but they are well within the province of the legislative arm of the government. Happily the legislature has seen the need, and now has these questions under

serious consideration. If it shall solve them justly and equitably within constitutional lines, or even make a substantial advance in the direction of such a solution, it will be entitled to the gratitude of all citizens. Confidently I can say that none will welcome such a solution more heartily than the judges of the courts."

Shortly *after* the adoption of its workmen's compensation act by the State of Wisconsin, Chief Justice Winslow, announcing the decision of the supreme court of that state, sustaining the law as constitutional, in the case of *Borgnis v. The Falk Co.*, 147 Wis. 327, said:

"It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employee against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop with few employees, and the stagecoach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones, but they were relatively few, and the employee who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. That is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers'

common law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty."

In the same case Marshall, J., concurring, said :

"The law approved is a very mild piece of legislation. While I would not suggest it is too moderate for now,—for that is not within my province,—yet I would not indicate that the legislature responded as fully as it might to the need for a system as directly as practicable, laying the personal injury burdens of production upon the things produced, where they belong, as should have been efficiently recognized long ago, and would have been had the law-making power appreciated that it is its province, not that of courts, to cure infirmity in the law. If criticism, unjustly and freely directed toward the latter and the human instrumentalities thereof, merely because of their fidelity to duty to maintain the laws as given, had been turned upon the former for failure to better conserve human happiness in the industrial field in the light of twentieth century conditions, untold suffering might have been prevented, which only the people's representatives could prevent. Tardy recognition of such duty casts no reflection upon legislative actors of today. Who can say but that they would have had the same ideals as now, and effected the same results long ago if opportunity had been offered them to do so? It has been, in the past, far easier to criticize a power which was helpless to supply a remedy, than to suggest one or move legislative power to adopt one."

See also:

- State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101;
Cunningham vs. N. W. Improvement Co. (Mont.) 119 Pac. 554;
State ex rel. Yaple vs. Creamer (Ohio), 97 N. E. 602;
Matheson vs. Minneapolis Street Ry. Co. (Minn.) 148 N. W. 71;
Hunter vs. Colfax Consol. Coal Co. (Iowa) 154 N. W. 1037;
Deibeikis vs. Link-Belt Co. (Ill.) 104 N. E. 211;
Western Indemnity Co. vs. Pillsbury et al., (Cal.) 151 Pac. 398;
Lewis & Clark Counties vs. Industrial Accident Board of Montana, 155 Pac. 268;
Western Metal Supply Co. v. Pillsbury et al. 156 Pac. 491.

The decisions in the cases last above cited hold compensation laws to be valid against attacks on the ground of unconstitutionality.

Of the Nature of "Compensation."

Not Compensation, But Relief.

In its primary aspect "compensation" is a name; it is nothing more than the name of a remedy. It is generally called "workmen's compensation." This is quite a misnomer. It is no more workmen's compensation than it is employer's compensation, or public compensation. It is not compensation at all in the first view of the enactments establishing the principle, but it is relief. It is designed to ameliorate the unsatisfactory and unwhole-

some conditions of which so much complaint has been made,—to relieve the courts, the employer, the employee and the public from intolerable conditions. It is designed to distribute burdens and to distribute benefits. In practical operation experience has demonstrated that it works such results.

The remedy knows nothing of the entertaining process of balancing nicely the faults of the employer against the faults of the employee and speculating upon the result, with all the disastrous train of consequences involved. The remedy provides for indemnity in every case where the casualty is incident to the employment, except where moral blame appears; it provides that not all the pecuniary burden shall be borne by the workman, recognizing that casualties are an essential phase of all industrial undertakings; that this is true even of the negligence of fellow servants and of the workman himself; that the workman, especially in large undertakings, does not have it in his power to modify the conditions of service; that the effective force in creating and enlarging the employment is the employer; that the work is undertaken primarily in the interest of the employer and ultimately in the interest of the public; that the employer can easily transfer to the customer the necessary pecuniary equivalent of any risk; that, whatever the primary method of placing the burden, the loss, whether by death or by disablement will be borne eventually not by the workman, but by society; that is, that it will be carried over into the selling price of the product.

It has been said:

“Compensation” is not “damages” nor meant in principle to be partial damages. Neither is it based upon the idea of tort, or meant to be a reparation for a wrong. In principle it is the payment, or advance, in the first instance, of the employer’s share

of a common loss in a common undertaking. It has, therefore, none of the injustice of the fictions of our law by which an employer without real fault is often held liable in full damages just as though he had done a wrong.

"This conception of a joint occupational risk, of a common responsibility for accidents from such occupational risks, and of a moral community in the resulting wage losses is the great basis of compensation liability. As a conception of justice, it is primary, and it must either be accepted as an axiom or be rejected, but the idea of its justice is supported by the fact that as a rule of public policy it has advantages above all others, and that in practical application it satisfies the natural desire for prompt and certain justice."

Accidents happen in one branch of industry with greater frequency than in another. It is the occupation in which a man is engaged and the inherent risks thereof that fix his accident hazard, and not the negligence or caution of either himself or his particular employer. Recognition of constancy and averages in industrial accidents therefore has suggested the most intelligent method of dealing with them, that is compensating them as "trade risk," eliminating proof of "cause" as to fault.

It has been recognized that there is a "chain of causation" accounting for this constancy of industrial accident. In addition to physical properties, there stand in this causal line both the employer and the employee, both interested in the promotion of the industry for mutual advantage, and, therefore, to be held to mutual responsibilities.

There are no satisfactory experience tables available covering the history of industrial accidents in the United States with reference to the percentage of accidents attributable to occupational risks, to the fault of both em-

ployer and employee, to the fault of the employer and to the fault of the employee, for the reason that such statistics have not been collected until very recently in America. Such figures as have been compiled covering American experience do not vary to any appreciable extent from German statistics covering German experience since 1887 and up to and including 1907. The German tables cover 3,861,560 working men in 1887 and 21,127,027 in 1907. During this time accidents by faults of the parties, employer and employee, or both, constitute 56.26 per cent. of the whole, while injury due to the fault of neither, but to the inevitable risks of the industries, constitute 43.74 per cent. In 1907 the employer was at fault in 16.81 per cent.; the employee 28.89 per cent.; both in 9.94 per cent., but neither in 44.36 per cent. The statistics collected by Wisconsin and Minnesota ascribe between 40 per cent. and 50 per cent. of industrial accidents to the inevitable risks; 70 per cent. is so ascribed by the Austrian tables.

If, taking the German tables, there be added to the inevitable risks injuries to which both parties contributed, more than 50 per cent. of the risks of the business will be found to inhere in the industry and may be regarded as its natural hazard. Nor must it be forgotten that ordinarily neither the negligence of the employer or employee would result harmfully but for the natural hazard of the business; that is, the hazard of the business, the employer and the employee are in the field of causation; and it must also not be overlooked that that which in legal consequence is regarded as negligence is most frequently but a manifestation of the physical and mental limitations of the persons engaged in the occupation, either as employer or employee.

Equalization of the Burden.

Under compensation there is an equalization of burdens between the immediate parties. While the employer is made liable in *all* proper cases of accident for a *known, definite and limited* amount, he is relieved from the speculative, indefinite and unlimited liability, which did exist in *some* cases; and while the employee surrenders a present doubtful, expensive and, therefore, unavailable right of recovery of *unlimited* damage in *some* cases, he receives in exchange a sure, inexpensive and available remedy in *all* cases. Here is clearly a sharing of both burdens and benefits.

Assuming insurance against the risk, which is the usual condition, instead of paying an insurance company to contest unfortunate victims to avoid the payment of indemnity for a common loss, the employer pays an insurance company to furnish medical, surgical and hospital treatment to set the injured man on his feet, as soon as may be, as a producing unit in the field of industry, and to indemnify in a measurable degree for the loss incurred, so that the sufferers may be carried over periods of adversity without all the terrible sacrifice and hard consequences which called for a new remedy.

Assuming that an employer does not carry insurance, he then becomes himself an insurer for the payment of compensation, that is, he carries his own risk; but here again it must be borne in mind that, while the employer is held liable for the payment of full statutory compensation, that payment is not, as for fault, in an unlimited amount, but for a known, exact and limited amount.

This legislation does not establish full liability without fault as has often been stated. That might mean—in fact it has been unfairly interpreted to mean—that the employer was left exposed to liability for his negligence with the common law defenses abrogated. Nothing could

be further from the fact. The compensation law does not hold anyone liable as for fault, but it holds the employer liable only as a quasi-insurer for a much smaller amount and frees him from liability for his fault. The employer does not pay or stand all the money loss in wages sustained by accidental disability. He pays only 65 per cent of it. The injured man pays or stands 35 per cent of the wage loss sustained. On the money side the employee pays or stands all the wage loss in the first two weeks or waiting period. If the disability does not last longer than that the employer pays no money on account of wage loss. In cases of permanent disability the employee carries the entire burden after a limited time. Here, as under every head of compensation, the loss is as exactly balanced between the immediate parties in their interest and in the public interest as may be done justly and scientifically in view of experience. The element of fault is wholly eliminated. A doctrine of averages takes its place. To quote Professor Ernst Freund (*The Survey*, April 29, 1911):

“Can the legislature say to the employer, ‘if for the purpose of your business you provide and require the use of dangerous appliances which are, humanely speaking, certain to result in accidents, you shall not let the consequences of the accidents lie where they fall, but assume your share of them?’ The principle of making a common peril of a common venture is not unknown to our jurisprudence; in another form and application it is not unlike the principle which, under the name of general average, is familiar to the maritime law of all nations. If the common law had not developed such a principle, this simply proves that the common law is not the last word of all wisdom and justice.”

The principles above mentioned lie at the foundation of compensation laws. Every other item of the cost of production in the industrial field has been included ex-

cept the human cost, and although the recognition of the new principle, which does include the human cost, has been belated in the United States alone, of all civilized countries, it has come to stay, for the reason that it is humanitarian, just and in keeping with the highest considerations of public welfare.

Outline Of The Plan.

The principal objects to be attained, then, in a compensation act are:

1. To furnish certain, prompt and reasonable compensation, limited in amounts and time, to the injured employee, which consists of—

(a) Medical and surgical treatment and adequate hospital service immediately after the injury, and for a limited time thereafter, to cure and relieve from the effects of such injury and to restore the sufferer to the ranks of producing labor.

(b) Such limited compensation or financial aid to the injured workman, based upon his wage income, as will maintain him and his dependents above want until he recovers from his injury or can develop a self-sustaining capacity.

(c) In the event the accident results in death, then such limited aid to those dependent upon him for support as will keep them above want until they can develop a self-sustaining capacity.

2. To utilize for the benefit of injured employees and those dependent upon them the vast sums of money wasted under the old system of employers' liability.

3. To inculcate and cherish more friendly and co-operative relations between employers and employees.

4. To encourage the introduction, maintenance and use of preventive devices and preventive discipline, so as to reduce the number of accidents to a minimum.

Legislation designed to accomplish these ends is well described as legislation to promote the general welfare. The California legislature has so entitled it. (Title, Chapter 176, Laws 1913, approved May 26, 1913):

“An act to promote the general welfare of the people of this State as affected by accident causing the injury or death of employees in the course of their employment, etc.”

The New York compensation law provides for due process.

There can be no doubt that the New York compensation law contemplates depriving certain citizens of property. Equally there can be no doubt that the deprivation is by due process of law. When it appears that due process is provided for, the single question left for consideration is to justify the deprivation of property irrespective of fault.

State Constitutional Amendment.

Deeming the step requisite to sanction a compulsory compensation law as suggested in a decision of the court of last resort (*Ives vs. South Buffalo Railway Co.*, 201 N. Y. 271), the people of New York adopted an amendment to Article I of the State Constitution providing for a complete system of such legislation as follows:

“SECTION 19. Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the

injury is occasioned by the wilfull intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, *or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation*, or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

By this nothing can be plainer than that the whole system was introduced in full contemplation of provisions for due process of law, for the legislature was empowered by the people to make such provision,—to provide "for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation."

The Statute.

There are full and explicit provisions in the statute for notice of claims for indemnity, for trials of issues, for opportunity to be heard, to be represented and to produce evidence; also provision is made for appeal to and review by the courts of the state. Not a single incident is omitted to make a perfect system of due process, unless, perhaps, there appears nothing to delay the final determination of the matters to be passed upon, which has become so familiar as an incident of procedure.

The provisions for notice of injury and claim are contained in Section 18 of the statute.

The system of determination of claims for compensation is not complex but is thoroughgoing and devised to operate expeditiously and inexpensively, contained in Section 20.

The matter of appeals is also much simplified as shown by reference to Section 23.

The matter of the application of the extended definition of due process of law will be covered in another division of this brief with reference to the police power.

The New York Constitutional Amendment and Compulsory Compensation Law constitute a legitimate and constitutional exercise of reserved state powers by the people and by the legislature.

"Reserved state powers" includes the police power. The people exercised the power reserved to them when they adopted the State Constitutional Amendment and the enactment of the Compensation Law was sanctioned under the exercise of that reserved power. When brought into operation the statute deprives of property him upon whom it operates but only under these conditions:

(1) Where the employer is carrying on a hazardous business (Sec. 2 and Sec. 3, subd. 1) for pecuniary gain (Sec. 5), and

(2) Where the injury or death suffered is accidental (Sec. 10), and

(3) Where the injury is *caused by the hazardous employment*, for it must "arise out of and in the course of the employment" (Sec. 10).

That the employment is required to be causative as a condition precedent to the right to compensation for disability is clearly shown by reference to the judicial

definition of the words "arising out of and in the course of the employment."

The words "arising out of" point to the origin or cause of the injury, and are descriptive of the character or quality of the injury, indicating that the injury is in some sense due to the employment.

Fitzgerald vs. Clarke (1908), 2 K. B. 796, 799;
1 B. W. C. C. 197.

The expression "in the course of" points to the time, place and circumstances under which the accident takes place (*Fitzgerald v. Clarke, supra*), or, as expressed by the Lord Chancellor in *Moore vs. Manchester Liners, Ltd.* (1910), A. C. 498; 3 B. W. C. C. 527, an accident happens to a workman "in the course of his employment" if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.

There is a fourth condition of limitation contained in Section 10 of the Statute to the effect that compensation shall be denied upon the wilfull intention of the employee to injure or kill himself or another, and also where the injury or death is solely caused by the intoxication of the employee.

The liability is fixed irrespective of negligence, but with reference to hazard brought home to the operations of the business; that is, causation. There is nothing shocking in so slight a modification in the law of liability. Negligence created hazard causing injury or death. Liability was based upon causation by negligence, which made or added to hazard. In this law there is preserved in full force the requirement of hazard and the requirement of causation. It is only the personal element that is eliminated, although all the persons engaged in conducting the industry stand in the field of

causation, whether it is a man or a piece of machinery that is broken or destroyed and must be charged to the industry.

Liability Irrespective of Fault.

It has been asserted that because the element of negligence as a prerequisite to fix liability has become deep rooted as a principle of the common law, it can not be disturbed by the legislature without encountering the barrier of the Fourteenth Amendment enjoining the observance of due process of law. Briefly, that there can not be liability without fault.

In the first place there can no longer be any question concerning the power of the legislature to abolish or modify the judicially developed rules with reference to assumption of risk, the negligence of fellow servants and contributory negligence.

Second Employers' Liability Cases, 223 U. S. 1,
32 Sup. Ct. Rep. 169.

This is certainly dealing with liability irrespective of fault, and no reason is suggested why it is not competent for the legislature to take the further step of enacting into law the principle that there shall be compensation irrespective of any fault.

Statutes making railroad corporations absolutely liable, without regard to negligence, for injuries to property caused by fires escaping from their locomotive engines, are clearly statutes creating liability without fault, yet these statutes have been upheld by all the courts of the states in which they have been enacted, as well as by this Court.

St. Louis & San Francisco R. Co. vs. Mathews,
165 U. S. 1.

Atchison T. & S. F. R. Co. vs. Mathews, 174 U. S.
96.

Statutes imposing a liability upon fire insurance agents, based upon the amount of insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen, have been upheld in the states of New York and Illinois.

Fire Department vs. Noble, 3 E. D. Smith (N. Y.) 440;

Exempt Fireman's Fund vs. Roome, 29 Hun, 391, 393;

Firemen's Benevolent Ass'n vs. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115.

Clearly these are statutes creating liability without fault. See also the case of *Noble State Bank vs. Haskell*, 219 U. S. 104.

A statute of Nebraska makes a railroad company liable in damages for injuries sustained by a passenger regardless of the question of negligence on the part of the company, except where the injury is caused by the passenger's criminal negligence, or by his violation of some express rule of the company, actually brought to his attention. This statute was upheld against a challenge on the ground that it violated the due process of law clauses of the state and federal constitutions, by this Court in *Chicago R. I. etc., R. Co. vs. Zerneck*, 183 U. S. 582.

In *Missouri Pac. Ry. Co. vs. Mackey*, 127 U. S. 205, this Court, in sustaining the Kansas act of 1874 abolishing the fellow servant doctrine in the case of railroad companies, said:

“The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be

taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetence of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt."

The law in Missouri prior to the enactment of the statute hereinafter referred to was that railroad companies were liable for fires set out by their engines only in cases of their negligence. In 1887 the legislature passed a statute making them absolutely liable in all cases for all damages without regard to negligence. The statute came before this Court in *Railway Company vs. Matthews*, 165 U. S. 1, being attacked upon the ground that it was an arbitrary, unreasonable and unconstitutional exercise of legislative power, imposing an absolute and onerous liability for the consequences of doing a lawful act and of conducting a lawful business in a lawful and careful manner, in which respect it was said to contravene the Fourteenth Amendment. The conclusion of the court, after reviewing many authorities, was thus stated:

"When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property which has no control over or interest in those instruments. . . . The statute is a constitutional

and valid exercise of the legislative power of the state."

The same ruling was made in *Railway Co. vs. Matthews*, 174 U. S. 96.

The Supreme Court of Connecticut in the case of *Grissell vs. Railroad Co.*, 54 Conn. 447, 459, said:

"The several counts in this indictment seemed to be based principally upon this one principle of the common law, that for a lawful, reasonable and careful use of his property the owner can not be liable. But this principle is not so wrought into the constitution or into the very idea of property that it can not be departed from by the legislature where protection to persons or property may require it."

In *St. Louis & Iron Mountain Ry. Co. vs. Taylor*, 210 U. S. 281, the plaintiff, a brakeman in the employ of the defendant railway company, was killed in the course of his work, and liability was asserted under the safety appliance act of congress. The court said (p. 294):

"The congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' . . . The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

The argument of hardship was advanced on behalf of the railroad company. The court says (p. 295):

"But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe draw-bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

Speaking on the question of the constitutionality of absolute liability, Mr. Freund says:

"If the rule of absolute liability is to be held to be unconstitutional, it must be on the ground that justice and equity forbid that a person be required to make good the loss of another unless some fault or culpability can be imputed to him. . . . But while the common law does require fault of some kind as a general principle, it has always recognized some exceptions (trespass by cattle, fire, etc.) and it can not be said that the rules of the common law represent the only and final conclusions of justice. The principle that inevitable loss should be borne, not by the person on whom it may happen to fall, but by the person who profits by the dangerous business to which the loss is incident embodies a very

intelligible idea of justice, and which seems to be in accord with modern social sentiment. . . . Logic and consistency therefore demand that liability irrespective of negligence should not be denounced as unconstitutional. The required element of causation may readily be found in the voluntary employment of dangerous instruments or agencies."

Freund on Police Power, Sec. 634.

The words "negligence" and "fault" do not appear in constitutions other than those of New York and California. The laws of negligence have been of judicial development and of legislative enactment. Since the decision of this court in *Second Employers Liability Cases*, 223 U. S. 1, no court has dissented from the view that the laws of negligence thus developed and enacted can be modified. If they can be extensively modified to accomplish a legitimate object, no good reason can be shown why they may not be abolished to accomplish a legitimate object. In the absence of an express constitutional shield, it plainly appears to be but a matter of degree and not at all a vital principle. Given the occasion of the legitimate end, such as has been outlined in another part of this brief, the sanction for action is not difficult to find. See *McCulloch v. Maryland*, 4 Wheat. 416, 421. 4 Law. Ed. 579, where it was said by this Court:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

It is the State of New York and the people of the State who are immediately concerned in the great problems arising out of her modern and splendid industrial development. The State and the people of the State

are anxious for the integrity of her industries, which turns upon the welfare of her wage workers and those dependent upon them for maintenance and education. It is the State which must provide for the widowed, orphaned, maimed and disabled army, which is the annual grim grist of her industries. While the situation is impressed with a deep national interest, it is competent only for the state to act, and the power to do so cannot be doubted.

The police power belongs to the states, has not been surrendered by them to the general government nor restrained by the Constitution of the United States, and is essentially exclusive.

Barbier vs. Conolly, 113 U. S. 31;

Jones v. Brim, 165 U. S. 180;

In re Rahrer, 140 U. S. 545;

United States v. E. C. Knight Co., 156 U. S. 1.

The Police Power.

Generally.

It is not possible to formulate a satisfactory definition of the term police power, nor is it possible to indicate the limits of the power. But it has been variously described. It is an expression used to designate the governmental powers not referable to some specific power. It is the general power to govern as distinguished from a specified power. It is governmental power minus the classified power. It includes the power to do the things which must be done and the things which ought to be done. It is essentially indefinite, for in large measure it deals with conditions which are new, with contingencies not theretofore considered, with problems in whose solution precedents are not available. Its sphere is the frontier of progress. All constitutional guaranties,

limitations, propositions and powers must be interpreted with reference to its necessary exercise. As was stated in the case of *Odd Fellows Cemetery Association vs. San Francisco*, 140 Cal. 235:

“It is settled law that all property is held subject to the exercise of police power, and that the provisions of the Constitution forbidding laws impairing the obligation of contracts, and declaring that property shall not be taken without due process of law, have no application in such cases.”

Ex parte Lacey, 108 Cal. 326;

Louisville Gas Co. vs. Citizens Gas Co., 115 U. S. 699;

Butchers' Union, etc. Co. vs. Crescent City etc. Co., 111 U. S. 746;

Fertilizing Co. vs. Hyde Park, 97 U. S. 659;

New Orleans Gaslight Co. vs. Louisiana Light etc. Co., 115 U. S. 672;

Barbier vs. Connolly, 113 U. S. 27;

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1;

Boyd vs. Alabama, 94 U. S. 645.

The scope of the police power has been variously defined by courts in many decisions. We quote:

“By means of this power, the legislature exercises a supervision over matters involving the common weal and enforces the observance by each individual member of society, of the duties which he owes to others, and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community; . . . in short, the police power covers a wide range of particular unexpressed powers reserved to the state, affecting the freedom of action, personal conduct and the use and control of property.”

People vs. King, 110 N. Y. 418;

C. B. & Q. Ry. Co. vs. Illinois, 200 U. S. 341;

“The power of the state, sometimes termed its police power, to prescribe regulations promoting the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity”.

Barbier vs. Connolly, 113 U. S. 31.

In re Kemmler, 136 U. S. 436.

“The police power is not subject to any definite limitations, but it is co-extensive with the necessities of the case, and the safeguard of the public interests.”

Camfield vs. United States, 167 U. S. 518.

“It aims to regulate the intercourse of citizen with citizen, to prescribe the manner of using one’s property and pursuing one’s occupation so as not to trespass on the property or rights of others, and as such is a power whose necessities and uses grow with the increasing complexities of our civilization and the increasing diversities in the industries and modes of life. The sphere, therefore, of its operations is ever widening. Every new use to which the forces of nature are put calls for a new interference of this power, that such use may not operate to the injury of others.”

Railway Co. vs. Mower, 16 Kan. 573.

“When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual, not affected by his relations to others, he might retain. . . . From this source come the police powers, which as was said by Chief Justice Taney in *The License Cases*, 5 How. 583, ‘Are nothing more or less than the powers of government inherent in every sovereignty—that is to say—the power to govern men and things.’ Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.”

Munn vs. Illinois, 94 U. S. 113.

"The term police power has sometimes been used in a narrow sense, embracing merely regulations for the preservation of the order, peace, health, morals and safety of the community. More recently, however, it has been extended to include all legislation looking to the well-being of society in its economic and intellectual aspects."

McGehee on Due Process of Law, p. 301.

This Court has recently reiterated what it has many times previously stated to be a settled rule of law, namely,

"In dealing with the relation of employer and employee, the legislature has necessarily a wide field of discretion, in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulation designed to insure wholesome conditions of work and freedom from oppression."

C. B. & Q. Ry. Co. vs. McGuire, 219 U. S. 570.

Mr Justice McKenna, in the recent case of *German Alliance vs Lewis*, 34 Sup Ct. Rep. 613, sustaining the right of the State of Kansas to fix the rate at which contracts of indemnity for fire insurance are written, used the following language in discussing the legislation:

"Against that conservatism of the mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance, the exercise of regulation was resisted and yet sustained, against attacks asserted to be justified by the constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained, or their constitutional guaranties impaired."

Again, speaking of the statutes of various states, concerning like matters, the learned justice says:

"A conception so general can not be without cause. The universal sense of a people can not be accidental. Its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis."

No more apt language can be used to characterize the development, acceptance and fixture of workmen's compensation legislation in the United States.

As to the occasion for the exercise of the police power arising out of new conditions, and as to the assertion of the power to meet new conditions developed by the progress of civilization, the court said in the case of *German Alliance Insurance Company vs. Lewis*, 34 Sup. Ct. Rep. 613:

"It would be rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and by the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the interstate commerce act was passed, and the commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to regulate at the time of the creation of the power, there was no prophecy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. *United States ex rel. Atty. Gen. vs. Delaware & H. Co.* 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. Rep. 527. It is oftener the existence of necessity rather than the prescience of it which dictates legislation."

The same case contains the statement of a clear distinction between power and policy with reference to the scope of legislative discretion in this language:

“Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power; but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to ‘pass laws whose purpose is the health, safety, morals and the general welfare of the people.’ The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited. ‘The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.’ *Chicago, B. & Q. R. Co. vs. McGuire*, 219 U. S. 540, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.”

Again, in *Holden vs. Hardy*, 169 U. S. 366, it was said:

“An examination of both these classes of cases under the fourteenth amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, which at the time the constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of in-

dividuals, had proved detrimental to their interests; while, upon the other hand, certain classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. . . .

This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the fourteenth amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado vs. California*, 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

This Court has taken a liberal view of the power of the legislature in the recent case of *Noble State Bank vs. Haskell*, 219 U. S. 104, involving the constitutionality of act of the Oklahoma legislature for guaranteeing deposits in state banks. The Oklahoma law, which was involved, required every state bank to pay one per cent. (afterwards raised to five) of its deposits into a guaranty fund, which was used to guarantee the solvency of all state banks. The court was unanimous in upholding the law. Mr. Justice Holmes said, in delivering the opinion:

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be

entitled to a return of what remained of it if the purpose were given up, still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use (*Clark vs. Nash*, 198 U. S. 361; *Strickley vs. Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield vs. N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372; *Bacon vs. Walker*, 204 U. S. 311, 315), and in the next, it would seem that there may be other cases besides the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume (see *Ohio Oil Co. vs. Indiana*, 177 U. S. 190). At least, if we have a case within the reasonable exercise of the police power, as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs (*Camfield vs. United States*, 167 U. S. 518) which may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In Compensation Cases.

The police power has heretofore been invoked and established to support compulsory workmen's compensation laws.

State ex rel. Davis-Smith Co. vs. Clausen, 65 Wash. 156, 177; 117 Pac. 1101, 1106 (37 L. R. A., N. S. 466).

Western Indemnity Co. vs. Pillsbury, et al. (Cal.), 151 Pac. 398.

In the above cited case the Supreme Court of Washington said:

"By means of it, the Legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it, the state may 'prescribe regulations promoting the health, peace, morals, education and good order of the people, and legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity.' In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. *State ex rel. Clausen vs. Burr*, 65 Wash. 156, 177, 117, Pac. 1101, 1106 (37 L. R. A. [N. S.] 466)."

In the above cited case, the Supreme Court of California, after stating its adoption of the rule announced by the Supreme Court of Washington, said:

"Under the common law the burden of industrial accident, where no fault was attributable to employer or workman, fell on the workman. Under the new law it falls, primarily at least, on the employer. It cannot be said that the one rule or the other is a necessary or logical result of fundamental principles of justice. The very trend of legislation exemplified by the act before us illustrates how general is the belief that an enlightened conception of justice requires that the old rule be superseded by the new. There is nothing contrary to the permanent and underlying notions of human right in the declaration that he who is conducting an enterprise, in the operation of which injury to others is likely to occur, shall respond for such injury to those who have not, by their own willful misconduct, brought it upon themselves.

"Such a change in the 'law itself, as a rule of conduct,' is as fairly within the scope of legislative power as is the abolition of the defence of fellow servant or that of contributory negligence. If the

law-making body deemed such change to be needed for the furtherance of the general well being, it is taking a view that may at least be entertained by reasonable minds, and its action is justified by the broad authority embraced within the police powers.

* * * * *

"But the laws defining rights of property, and personal relations, or the obligations of individuals to their fellow beings or to the state may, in general, be moulded and altered by the states at will if the change does not affect acts previously done, nor property rights previously acquired. Therefore, a law which disturbs no vested right of property, which is not retroactive in its operation upon the conduct of persons, but which looking to the future, merely changes the existing rules governing the liability of masters for injuries caused by accidents occurring to their servants while in their service, does not come within the scope of the fourteenth amendment. It is simply an exercise by the state of its governmental power to pass laws regulating the ordinary private rights of persons and property. The law in question is of this character. It does not affect past transactions or previously acquired rights of person or property. It provides for notice and a hearing as to liabilities arising under it. And it bears alike upon all affected by its provisions.

* * * * *

"The employment creates a status involving relative rights and obligations, and it is properly for the Legislature, acting within the bounds of fairness and reason, to determine the nature, extent, and application of those rights and obligations. If the law-making body determines that one of the incidents of that relationship be that the employer must compensate his employee for accidental injury received in the service, an enactment to that end is neither arbitrary or outside the scope of legislative authority."

It is therefore respectfully submitted that the New York Workmen's Compensation Statute does not contravene any provision of the Federal Constitution.

PART II.

The Compensation Statute of the State of New York does not encroach upon admiralty jurisdiction either in the matter of operation or administration, but is within the saving clause of the judicial code: though the contract is maritime, the obligation fixed is non-maritime.

This proceeding is not one founded upon or sounding in tort. The whole idea of tort or wrong is eliminated by the statute. The obligation at the base of the award is one imposed by the State, for politico-economic reasons, upon certain employers, and attaches to every contract of hiring within the terms of the act, which terms are broad enough to include, and do include, seamen coming within its provisions.

The general propositions that we shall advance and discuss are three in number, to wit:

1. There was an absence of congressional legislation determining the personal liability of the employer (the shipowner) for indemnity in cases of injury to his employees on board ship (seamen), and there was no general maritime law determining such liability (except in one case); so the State law controls under the facts in the instant case. If this was a case within the admiralty and maritime jurisdiction of the courts of the United States, that jurisdiction would not be exclusive; but the obligations imposed by the State act would be enforceable in the state tribunals, under the "saving" clause of the act of the congress of 1789 (R. S. Sec. 563, subdiv. 8, Sec. 711, subdiv. 3; U. S. Judicial Code, Sec. 24, subdiv. 3, and Sec. 256, subdiv. 3), "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

2. The obligation here sought to be enforced is not in its essence maritime; and in the absence of congressional legislation imposing personal obligations upon shipowners in personal injury cases, the relief provided by the state act is enforceable in the manner provided thereby.

3. There is no denial of equal protection of the laws.

PROPOSITION "1."

There was no federal legislation determining the personal liability of the shipowner for injuries to seamen on board his ship. We are entirely satisfied as to that. In this connection it is important to consider the manner in which the law governing seamen has been arranged by the commissioners who revised the statute law of the United States. The law providing for that revision (7 Fed. St. Ann., p. 149, et seq.) specifies that the commissioners shall arrange the same under titles, chapters, and sections or other suitable divisions and subdivisions, with head notes briefly expressive of the matter contained in such divisions; also, with said notes, so drawn as to point to the contents of the text.

The title relating to "Seamen" (6 Fed. St. Ann., p. 843, et seq.) is divided into chapters as follows:

- I. Shipping Commissioner;
- II. Shipment;
- III. Wages and Effects;
- IV. Discharges;
- V. Protection and Relief; etc.

Contained therein are many provisions relating to the rights, duties and liabilities of seamen, but nothing whatsoever governing the personal liability of ship owners for indemnity in cases of personal injury to seamen.

It is equally certain that the general maritime law does give to the seaman in one case of injury a *lien against the vessel*, with the right to enforce that *lien against the vessel*. And it is here that the resulting confusion has arisen, confusion that must be cleared up.

The right maritime and the right non-maritime.

The point is this:

In cases under the maritime law, where the facts give the seaman a lien because of his injuries, *the vessel herself is the offending thing or the wrong doer*, although, of course, ultimately it is her owner who pays for the tort. The personal liability or obligation of the owner, for which he can be sued *in personam*, is a thing apart from the maritime lien of the seaman in the thing; and this personal obligation is no more maritime than non-maritime. In *Sherlock vs. Alling*, 93 U. S. 99, 23 L. ed. 822, this Court says:

"By the common law, the owners are responsible for the damages committed by their vessel, without any reference to the particular agent by whose negligence the injury was committed. By the maritime law, the vessel, as well as the owners, is liable to the party injured for damages caused by its torts. By that law, the vessel is deemed to be the offending thing, and may be prosecuted *without any reference to the adjustment of responsibility between the owners and employes*, for the negligence which resulted in the injury."

In the same case, Justice Field said (23 L. ed. p. 820)

"In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating upon *all* subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

The State act has given the seaman a right to enforce against the owner a *personal obligation* without pretending to deal at all with the question of *lien*.

The case referred to in which a seaman has a lien against his vessel for personal injuries *for a tort* because some defect *in the vessel herself* has caused the injury, is thus stated:

"The law may be considered as settled upon the proposition that the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by the seaman, in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship."

The Fullerton, 167 Fed. 11.

The liability of the ship in such a case is the sole liability governed exclusively by the maritime law.

"The *distinctive* feature of an admiralty suit is that the *privilegium*, or right to pursue the particular ship, exists, independently of possession, and exists *only* against the particular vessel on, or on account of, which the cause of action arose, which in the eye of the admiralty law, is the real contracting debtor or offender, the real defendant."

Stewart vs. Potomac Ferry Co., 12 Fed. 300.

This is more fully and forcibly expressed by this Court in the case of *Knapp vs. McCaffery*, 177 U. S. 648, as follows:

"The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner the proceeding is essentially one in admiralty. If, upon the other hand, the cause

of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (Sec. 563) of a common-law remedy. The suit in this case being one in equity to enforce a common-law remedy, the state courts were correct in assuming jurisdiction." (Court's italics.)

"But the right to proceed *in rem* is distinctly an admiralty remedy, and hence exclusively within the control of the United States courts; no state can confer jurisdiction upon its courts to proceed *in rem*. Nor could congress give such power to a state, since it would be contrary to the federal grant in the constitution. So liens given by the laws of a state for matters which are subjects of admiralty jurisdiction are enforceable against the thing only in the federal courts; though the debt on which the lien is founded may be sued on *in personam* in the state court. *This right to proceed in rem, according to the methods of the maritime law, is the 'exclusive' jurisdiction conferred upon the district courts by section 563 of the Revised Statutes, subdivision eight.*" Ben. Adm. 4th ed., sec. 128.

"The relation of the district courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says: 'Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent (as in cases of possessory suits, mariners' wages and marine torts), there is nothing in the constitution necessarily leading to the

conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. 'The reasonable interpretation,' continues the commentator, 'would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the states could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. *This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law jurisdiction.*' *Taylor vs. Carryl*, 61 U. S. 583."

In the Absence of Congressional Legislation, the State Law Can Create and Enforce the Personal Obligation.

In *Lindstrom vs. International Nav. Co.*, 123 Fed. 475, Judge Wallace says:

"The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas, the vessel being deemed a part of the territory of the state to which it belongs; and it follows that a state statute which creates a liability or authorizes a recovery for the consequences of a tortious act operates as efficiently upon the vessel of a state when it is beyond its boundaries as it does when it is physically within the state."

Kalleck vs. Deering et al., 161 Mass. 469, was an action in tort for personal injuries suffered on board a coasting vessel while in harbor, and where recovery was defeated because of the fellow servant rule—a mate acting

as master of the vessel. The opinion was written by Justice Holmes, the writer of the opinion in the case of *The Hamilton*, to which we shall call the court's attention presently. In the Massachusetts case, Justice Holmes said (161 Mass., pp. 471-2) :

"The considerations apply, and have been applied by common-law courts, to the captain of a vessel, and it has been said that he is a fellow servant within the meaning of the rule (citing cases). So in this commonwealth as to a mate. *Benson vs. Goodwin*, 147 Mass. 237. Without considering what may be the best mode of expressing it, we agree with the result of these cases.

"But it is argued that a different doctrine obtains in the admiralty, and that we ought to follow the law which would be administered by the courts especially constituted for the affairs of seamen. For this argument *it does not matter precisely where the vessel was*. If the accident happened within the body of the county the admiralty jurisdiction would not be excluded (citing cases); *and if upon the high seas, that of the common law is not to be denied*. *Percival vs. Hickey*, 18 John 257; *Wilson vs. Mackenzie*, 7 Hill (N. Y.), 95, 97.

"The case most relied on is *The A. Heaton*, 43 Fed. Rep. 592, followed by *The Frank & Willie*, 45 Fed. Rep. 494, and *The Julia Fowler*, 49 Fed. Rep. 277. Compare *Morse vs. Slue*, 1 Vent. 238; s. c. 3 Keb. 135, 1 Molloy de Jure Marit. book 2, c. 2, sec. 2. If the American cases meant that the admiralty courts had worked out *the liability of the ship* for the acts of the captain from their own peculiar principles, *it might be necessary to inquire whether the personal liability of the owner followed from the same premises*, and if it did, why the common law should yield to the admiralty rather than the admiralty to the common law. But it is hardly to be expected that different views of the substantive law should be enforced by the same judge sitting in different courts. In *The A. Heaton*, Mr. Justice Gray *did not* declare a doctrine peculiar to the admiralty;

he merely deferred to a decision upon the common law from which he himself had dissented, which is inconsistent with cases in this commonwealth, and which has been explained by a later decision of the court which rendered it. *Chicago, Milwaukee and St. Paul Railway vs. Ross*, 112 U. S. 377. See *Baltimore and Ohio Railroad vs. Baugh*, 149 U. S. 368. Under these circumstances the Circuit Court cases *do not seem to us sufficient reason for departing from the common law* because the accident happened on board ship. Moreover, it is very plain that we can not adopt the admiralty law as a whole. We can not divide the damages when the plaintiff has been guilty of contributory negligence, as was done in *The Julia Fowler*, *The Max Morris*, 137 U. S. 1. See *Dowdell vs. General Steam Navigation Co.*, 5 El. & Bl. 195, 206."

This case is significant for three reasons: (1) It points out that the law of the state as to personal injuries (in proceedings *in personam*) "is not to be denied"; (2) the suggestion that the liability of the owner personally may depend upon a different law from that fixing the liability of the ship (*in rem*); (3) that where the division of damage doctrine for contributory negligence is not a part of the state law, the state court could not enforce that doctrine in any action for injuries on board ship.

"This action is not one authorized by the common law or by the maritime law of this country. The *Harrisburg*, 30 L. ed. 358. It rests solely upon the statutory enactments of the territorial jurisdiction wherein the negligence and the death occurred; in this case, upon the New Jersey statute of 1848 * * * Though this court has jurisdiction of the cause of action in consequence of its maritime nature as a tort committed upon navigable waters, it can give no relief *except in conformity with the statute that creates the right.*" (Citing many cases.)

Stern vs. La Compagnie Gen'l. Trans. Atlantique, 110 Fed. 998.

The Old Dominion S. S. Co. vs. Gilmore, 207 U. S. 398, 52 L. ed. 264 (The Hamilton), was a case of a collision upon the high seas between two vessels, each of which was owned by a Delaware corporation. Recovery was sought under the laws of Delaware by the representative of a person whose death was caused by the tort. The court said, speaking through Justice Holmes, who wrote the opinion in *Kalleck vs. Deering*, *supra*.

"The power of congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction.' Art. 3, Sec. 2, 130 U. S. 557. The doubt in this case arises as to the power of the states where congress has remained silent.

"*That doubt, however, can not be serious.* The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789 (1 Stat. at L. 77, Chap. 20, Sec. 9), 'saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it.' (Rev. Stat. Sec. 563, cl. 8 U. S. Com. Stat. 1901, p. 457), *leaves open the common-law jurisdiction of the state courts over torts committed at sea.* This we believe always has been admitted. *Martin vs. Hunter*, 1 Wheat. 304, 337, 4 L. ed. 97, 105; *The Hine vs. Trevor* (The Ad. *Hine vs. Trevor*), 4 Wall. 555, 571, 18 L. ed. 451, 456; *Leon vs. Galceran*, 11 Wall. 185, 20 L. ed. 74; *Manchester vs. Massachusetts*, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, *it would be strange if the state might not make changes by its other mouthpiece, the legislature.*

"The same argument that deduces the legislative power of congress from the jurisdiction of the national courts, *tends to establish the legislative power of the state where congress has not acted.*

Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American S.S. Co. vs. Chase*, 16 Wall. 522; 21 L. ed. 369. So far as the objection to the state law is founded on the admiralty clause in the constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt. The same conclusion was reached in *McDonald vs. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664, where the death occurred on the high seas. *Sherlock vs. Alling*, 93 U. S. 99, 23 L. ed. 819, reinforces Chase's case, and answers any argument based on the power of congress over commerce, as to which we hardly need refer also to *Cooley vs. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624; *Wilson vs. McNamee*, 102 U. S. 572, 26 L. ed. 234; and *Homer Ramsdell Transp. Co. vs. La Compagnie Generale Transatlantique*, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831, concerning state pilotage laws."

Further the court added:

"We pass to the other branch of the first question—whether the state law, being valid, will be applied in the admiralty. Being valid, it created an *obligatio*, a personal liability of the owner of *The Hamilton* to the claimants. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. It might not give a proceeding *in rem*, since the statute does not purport to create a lien. It might give a proceeding *in personam*.

"If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all."

Old Dominion S.S. Co. vs. Gilmore, 207 U. S. 405-406, 52 L. ed. 270.

*The Right Created Here Is the Same in Principle as That
in Wrongful Death Cases.*

The act here creates an obligation to compensate in the cases following:

1. Where the employer was not negligent. Where the employee was not negligent;
2. Where the injury is caused solely by the negligence (not wilful) of the person injured;
3. Where the injury is caused by contributory negligence or the negligence of a fellow servant.

In each of these cases a libel can be brought on the tort *in personam* in the admiralty, where the locality of the tort would give jurisdiction. The court would have jurisdiction to dispose of the suit; but no cause of action could be stated thereon (except in certain contributory negligence cases), unless the state law of the place of the shipowner had created a right or abolished the common law defenses, for the reason that the admiralty would otherwise have no maritime law granting relief and would enforce the common law defenses.

The excepted contributory negligence cases are those in which a defect in the ship or her equipment is the cause of the injury; and in such cases there is a lien because of the maritime law, which governs and divides the damages, irrespective of the common or statutory law, whenever the proceeding is in the admiralty either *in rem* or *in personam*, although the litigant in this case, too, may elect to go into the state court and abide by its rules as to damages.

Prior to the statutory enactments giving damages for wrongful death, all claims for such deaths were, of course, *damnum absque injuria*, both at common law and in the admiralty. The heirs or representative of the person killed could, where the locality gave jurisdiction, start a

suit in the admiralty or in the common law courts, and such courts would have jurisdiction to dispose of the same; but there could be no recovery. As soon, however, as the right to recover was created by the state statute, the heirs or representative could, in those cases where the death occurred on board ship, recover in the state courts (as well as in the admiralty), the same as if the death had occurred on land.

And so here: In all of the cases mentioned in "1," "2" and "3," (save in the excepted contributory negligence cases) there was no right of recovery, either under common law or maritime law, for the damages caused by the accident. Either of those courts would take jurisdiction to dispose of the suit, but there could be no recovery. The right to recover having been created by the statute, that right (as is pointed out in *The Hamilton, supra*, and the Second Employers Liability Cases, 223 U. S. 1) will be enforced; all of the cases under the act now fall squarely within the principle of the wrongful death cases. Nor does it matter in the slightest that the liability may be in tort in the admiralty and contractual in its nature in the state tribunal; for we will see in the case of assault and battery on a seaman by the captain of a vessel within the admiralty and maritime jurisdiction, the seaman may sue *in personam* in the admiralty on the tort or may elect to go into the state tribunal to obtain compensation for the breach of the contract of good treatment. And the fact that the measure of compensation afforded him may be different does not control his election.

The record here shows that the injury in this case comes under "I". In other words, it is entirely a case of the creation of a right where none existed theretofore either in the admiralty or at common law.

In the case of the *American Steamboat Company vs. Chace*, 83 U. S. 535, 21 L. ed. 372, it is said:

"The state courts have jurisdiction if the admiralty courts have no jurisdiction, and a few observations will serve to show that the jurisdiction of the state courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of that topic can not be necessary, as several decisions of this court have established that rule as applicable in all cases where the action in the state court is in form a common law action against the person, without any of the ingredients of a maritime lien. . . . When the suit is *in personam* against the owner, the party seeking redress may proceed by libel in the district court, or he may, at his election, proceed in an action at law, either in the circuit court if he and the defendant are citizens of different states, or in a state court as in other cases of action cognizable in the state and federal courts exercising jurisdiction in common law cases."

There Is No Question of Interference With The General Maritime Law.

There was no right of *action* under the common law or under the admiralty law in wrongful death cases; but the common-law *remedy* to proceed *in personam* became available to the claimant not only in the admiralty and in those states where the common law is still the foundation of the rule of conduct, but also in those states where the legislative enactments furnish such rules. And this for the simple reason that the common-law remedy or the right of the litigant to proceed *in personam* against the defendant is common to all.

We are not here dealing with a tort; but we shall, for greater clearness, go into the jurisdiction of admiralty in torts causing personal injuries. In all such cases, the jurisdiction of the admiralty depends upon the locality of the tort. The rule is correctly stated in the case of *The Atrato*, 90 Fed. 113, and is summed up thus:

“A court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect, and produces injury to the person or the property of another on navigable waters. In that case it would be unimportant where the breach of duty occurred, or where the physical injury was completed.”

And the converse of this proposition is equally true.

So that if a seaman were working *on the wharf* alongside of his ship, and was injured by the negligence of the captain or mate working *on shore* with him, the law of the state might or might not give him a cause of action against the owner of the vessel depending upon the law of the state as to the negligence of a fellow servant. If the state law did give him a right of action, he could enforce it in the state court, but could not enforce it in the admiralty court, notwithstanding the fact that the relation of master and servant existed between him and the shipowner under a maritime contract. And, further, not even the congress, if it had made laws applicable to seamen governing the relation of master and servant in case of injuries to seamen, could thereby confer jurisdiction upon the admiralty in such a case, for this Court has frequently said that the admiralty jurisdiction comes from the United States constitution, and can neither be increased nor diminished by the congress.

On the other hand, if the same tort occurred on board the ship while alongside the wharf or on the high seas, the state court would in the same manner enforce liability, if any was created by the state statute, *in personam*, because of the “saving” clause; or if there were congressional legislation regulating the law of master and servant as to personal injuries to seamen, such legislation would be effective to the exclusion of the state’s.

And if the accident was because of some defect in the ship herself or her equipment, and the seaman elected to

proceed *in rem*, then the admiralty would be his only forum; but if he elected to proceed *in personam*, he could proceed either in the admiralty or in the state court. If he chose to proceed *in personam* in the former, his rights would be determined under the general maritime law, because the facts constituting his cause of action *gave him a lien against the thing under that law*; and in such action the admiralty would not permit contributory negligence to prevent recovery, but would divide the damages. If he elected to proceed in the state court for exactly the same cause of action, as he could do, contributory negligence would defeat any recovery, if that rule of the common law was the rule of the state forum.

In the case at bar, the record does not show any lien against the thing under the maritime law.

The facts that the right of action against the owner on his personal liability may be enforced in either forum and that the measure of relief may be different according to the forum chosen do not make the personal liability a matter of admiralty and maritime jurisdiction any more than they make it a matter of common law jurisdiction. If they did, the liability could not, of course, be enforced at all in the state court.

Rule 16, of the rules of the United States Supreme Court in admiralty which have the force of law, provides that, "In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." It is an implied part of every contract of shipment that the seaman be properly treated. If the captain, in breach of this implied contract, beat the seaman, the latter can proceed *in personam* for the tort either in the admiralty or the state court, or he may proceed *in rem* in the admiralty (*The David Evans*, 187 Fed. 177) or *in personam* in the state court for the breach of contract.

That it was the state law and not the maritime law that determined the personal obligation of the owner in cases of injuries to a seaman on board ship (except where a libel is brought *in personam* in the admiralty for injuries caused by a defect in the ship or her equipment) becomes more apparent upon further investigation.

The cases of *Quinn vs. N. J. Lighterage Co.*, 23 Fed. 363, and *Quebec S. S. Co. v. Merchant*, 133 U. S. 75, were both cases *in personam* in the federal courts in which the accident occurred on board ship and where the action was at law. In each case the court enforced the then existing law of the place, without any suggestion of the existence of a maritime law controlling the rights of the parties. Likewise in the case of *Kalleck vs. Deering*, 161 Mass. 472; *Gabrielson vs. Waydell*, 135 N. Y. 13, and *Silveira vs. Iverson*, 125 Cal. 266, 128 Cal. 187, the state courts enforced the then existing state law, and Justice Holmes, in the Massachusetts case, made it clear that there was no exclusive maritime law controlling the personal obligation of the owner.

"That a contract creating the relation of master and servant, made in a country for a service to be rendered in such country, imposes only such obligations and confers only such rights, as the terms of the contract stipulate, and the laws of such country imply. That the vessels of such country are, even upon the high seas, a detached, floating portion of its territory, and *exclusively within the influence of its law, so far as the internal economy of the vessel is concerned.*"

The Lamington, 87 Fed. 755.

The substance of the matter is this:

There is no such thing as a maritime law in the exclusive sense in *any* case, except where the facts give the right to proceed against the thing itself; that in all cases when the facts do not give such right, the suitor

may enforce in the state tribunal whatever rights the state law will give him. It would be a most strange anomaly if the maritime law controlled the personal obligation of the owner to the seaman in those cases where the facts do not give a lien. It would be the only instance of the kind known to the maritime law. There is no such anomaly.

So the act creating the personal obligation of the shipowner is not opposed by any maritime law. This grows still clearer by investigating those cases where the law has created a lien against the vessel where none existed under the maritime law.

Until the congress created it in 1910, there was no implied lien under the maritime law for supplies or other necessities furnished domestic vessels, although in all such cases the admiralty was the only court in which the lien created by the state statute could be enforced *in rem*, but only when it came strictly within the terms of the statute (*The Red Wing*, 14 Fed. 843), and then it was subject to all the limitations and qualifications thereby imposed (*The H. N. Emilie*, 70 Fed. 511), whether as to the amount of the claim (*The St. Mary*, Fed. Cas. No. 12242), the employment of the vessel (*The Haytian Republic*, 65 Fed. 120), the persons making the contract (*The Wm. A. Levering*, 35 Fed. 783), or the recording of the claim (*The Julia L. Sherwood*, 14 Fed. 590).

The admiralty, however, was controlled by its own rules in matters of procedure and enforced these liens by the same method that maritime liens were enforced; but the admiralty having once concluded that the state law fixed upon a maritime contract a lien maritime in its nature and that all the conditions of that law had been complied with, then the admiralty for all purposes of enforcing it, adopted the lien into the family of maritime liens from that time (*The J. E. Rumbell*, 148 U. S. 20). But never at any time was there any question as

to the right of the state tribunal to enforce the personal obligation of the owner for the debt (*Norton vs. Switzer*, 93 U. S. 356; Ben. Adm., 4th ed., sec. 128). After the congress gave a maritime lien in such cases, all of such state legislation, as far as the lien was concerned, was entirely superseded by the act of congress; but, of course, the personal liability on the debt still remains enforceable in the state tribunal (*Norton vs. Switzer, supra*).

Very few of the states give a lien against the vessel in case of wrongful death. Virginia, however, is one that does (*The Glendale*, 81 Fed. 633). In all such non-lien states the personal obligation of the owner on the tort is enforceable *in personam* in either the state or admiralty tribunal; but it is the state and not the maritime law that is enforced, and the Virginia law is, of course, also enforceable in this way. But if a suitor wishes to enforce the *lien* given him by the Virginia law, he must go into the admiralty, the only court where the right *in rem* can be enforced. *The A. W. Thompson*, 39 Fed. 117:

“The action rests entirely upon the state statute. Any defense, therefore, that would bar recovery in the state courts, with reference to which the statute must be deemed enacted, must be held equally good in the admiralty.”

But a state may give a lien for building a ship and provide for enforcing the same by process purely *in rem* in its own courts, because a contract for building a ship is not a maritime contract, and therefore the lien is not maritime in its nature (*The Glide*, 167 U. S. 620). So that what this Court holds is that the *exclusive* jurisdiction can not be encroached upon by the state courts giving a statutory remedy *in rem* in cases where there is a lien given by the maritime law or where the lien given by the state is maritime in its nature. As to all cases, then, not within the *exclusive* jurisdiction of the admiralty,

the suitor may pursue his common-law remedy in the state tribunal; and where the matter is not within the admiralty and maritime jurisdiction the state court may even provide a statutory remedy purely *in rem* after the manner of the civil law.

These conclusions, then, follow necessarily:

There is no maritime law that determines the personal obligation of the owner in such cases, except in the one instance where a libel is brought *in personam* in the admiralty for injuries caused by a defect in the ship or her equipment; and even in the excepted instance, the suitor may go into the state tribunal and abide by its laws;

In the absence of congressional legislation, the state may create a personal obligation of the owner, if that obligation may be enforced in the state tribunals without interfering with the exclusive jurisdiction of the admiralty;

Neither the congress nor the states can add to or subtract from the constitutional grant of exclusive admiralty and maritime jurisdiction, and this exclusive jurisdiction is exercised solely in enforcing maritime liens or liens maritime in their nature.

The personal obligation, created by the state act, of the shipowner to the seaman, in case of injury, is one in which the common-law remedy is saved to the suitor, and it does not in any way infringe upon the exclusive admiralty and maritime jurisdiction, and for these reasons it is no forbidden interference with interstate commerce, because as held in *Sherlock vs. Alling, supra*, "it was never intended to cut the states off from legislating on *all* subjects relating to the *health, life and safety* of their citizens."

Naturally there is no inherent reason why seamen on vessels belonging to the different states of the Union should be the only persons held in bondage to out-worn

common-law doctrines; no reason why they should remain under medieval conditions while the rest of the world goes forward. If a seaman is injured on his vessel while going up the Hudson River, he is entitled (as has frequently been held) to have the laws of the State of New York applied to his case; if he is injured on a New York-owned vessel on the high seas, he is equally entitled to have the laws of New York applied, if he goes about it the right way, as has also been held.

So the State, in extending to New York seamen the relief afforded by this act, trenched in no way whatsoever upon any maritime rights or jurisdiction.

The Remedy Provided by the Act Is a Common-law Remedy.

The most recent holding of this Court is that if the proceeding is one *in personam* in the state court, even if the vessel be attached, the remedy is one at common law.

Rounds et al. v. Cloverport, etc., Co., 237 U. S. 303.

The case of *Knapp, etc. vs. McCaffery*, 177 U. S. 644, dealt somewhat at length with the question as to what was exactly the remedy saved in the language following:

“It (the case under consideration) was certainly not a common-law action, but a suit in equity. But it will be noticed that the reservation is not of an *action* at common law, but of a common-law *remedy*; and a *remedy* does not necessarily imply an *action*. A *remedy* is defined by Bouvier as ‘the means employed to enforce a right, or redress an injury.’ While, as stated by him, ‘remedies for non-fulfillment of contracts are generally by action, they are by no means universally so.’”

Then, after enumerating many of the remedies at common law, the court adds: "All these remedies are independent of an action"; and concludes thus:

"Some of the cases already cited recognize the distinction between a common-law action and a common-law remedy. Thus, in the *Moses Taylor*, 4 Wall. 411, 431; *sub nom. The Moses Taylor vs. Hammons*, 18 L. ed. 397, 402, it is said of the saving clause of the judiciary act: 'It is not a remedy in the common-law courts which is saved, but a common-law remedy.' To the same effect is *Moran vs. Sturges*, 154 U. S. 256, 276, 38 L. ed. 981, 987, 14 Sup. Ct. Rep. 1019."

"It is objected that the suit is for a maritime tort *where the remedy is by statute*, and that the jurisdiction rests in the courts of the United States and can not be exercised by the state tribunals. The point is not well taken. Rev. Stat. U. S., sec. 563, subd. 8. The common law gives the right of a common-law remedy to redress the grievance *which was made actionable by the state statute*, and this brings the case within the saving provision of congress. *Steamboat Co. Chace*, 16 Wall. 522; *Leon vs. Galceran*, 11 Wall. 188; *Brown vs. Gilmore* (92 Penn. St. 40). See also *Brig City of Erie vs. Canfield*, 27 Mich. 479; *McDonald vs. Mallory*, 77 N. Y. 546; *Schoonmaker vs. Gilmore*, 102 U. S. 118, and *Brown vs. Davidson*, 102 U. S. 119."

It is expressed thus in the 4th Ed. of Benedict's Admiralty, Sec. 128:

"The common-law remedy here mentioned is the right of a plaintiff to proceed *in personam* against a defendant, which remedy the common law is competent to give."

And the fact that the measure of damages or the extent of the remedy may be different in the two forums is no obstacle, as is clearly pointed out by Benedict (4th Ed.,

Sec. 129), and as appears in many of the authorities above quoted.

The constitution of the state, section 19, article I, authorizes a remedy *in personam* for the enforcement of a personal liability. Acting in accordance therewith, the legislature has provided a method by which the extent of the employer's personal obligation may be determined. This method is to be worked out by a combination of the industrial commission and the courts. In other words, there is provided a complete system for ascertaining the extent of this obligation; and this system must be considered as a whole. Thus considered, it provides a remedy giving a plaintiff the right to proceed *in personam* against a defendant, or a common-law remedy, as defined by the authorities above.

We have already seen that this Court says, in the Knapp case, *Supra* (which was in equity), that the common-law remedy does not necessarily imply an action at all; so it is certain that the remedy provided by the act is within the "common-law remedy" clause.

But, further, there is a large class of cases dealing with the condemnation of land and the removal, at some stage of the case, to the federal court. The methods of ascertaining therein the value of the land are various, and some of these cases where the value is ascertained by a commission may fall short of being a "suit" in the legal sense of that term. What is the equivalent to a suit in law is best described by Judge Brewer in the case of *Colorado Midland Ry. Co. v. Jones, et al.*, 29 Fed. 193, *et seq.*, where the two leading cases of the United States Supreme Court are cited, as follows:

"The legislature may provide under what circumstances and in what manner this compensation shall be determined, and, *when it has provided that which is equivalent to a suit at law* in which the only controversy remaining to be considered is the amount of compensation, there exists a suit, a controversy—

which, under the federal removal act, may be removed to the federal courts, provided the citizenship of the parties justifies it. That right of removal has been affirmed in two cases in the Supreme Court (*Boom Co. v. Patterson*, 98 U. S. 403, and *Union Pac. R. Co. vs. City of Kansas*, 115 U. S. 1). * * *

"The legislature has provided for a trial by which the amount of damages to be given shall be ascertained. It may be by a commission of three freeholders, or it must be, on the application of the party whose property is sought to be taken or damaged, by a jury of six persons. It may be in vacation; it may be in term-time; but all the elements of a judicial inquiry are provided for—a tribunal, the right of either party to appear, to present its testimony, to have the question passed upon by the court or judge, error taken and reviewed by the Supreme Court. Now, while it is true that, in some respects, this proceeding is not in accord with the ordinary proceedings for the trial of a cause, as, for instance, there is no common-law jury, yet that fact does not in any manner abridge or limit the proposition that here is a trial provided for, and a trial for the determination of the simple question of compensation. The proceedings assimilate very closely with the ordinary proceedings of a court of law; and it seems to me the case comes within the opinion of the Supreme Court in the two cases referred to."

This case was quoted with approval by this Court in 124 U. S., at page 200.

Proposition 2: The obligation here sought to be enforced is not in its essence maritime; and, in the absence of Congressional Legislation providing different or maritime relief for seamen in cases covered by the act, the relief thereby provided can be enforced by the State.

The *obligatio* was created by the state for politico-economic reasons. It is contractual or quasi-contractual in its nature. It results from a domestic contract of hire,

employing within New York State a resident thereof. The obligation becomes effective when the statutory conditions concur to fix the right to indemnity for injury or death. That is, the direct subject matter of the adjudication is the obligation to compensate the employee, because of the hiring. Whether the nature of the services rendered is oiling on a ship at sea, stevedoring on her in port, or filing in a sawmill on shore is not material in creating the obligation. In the language of the court in the case of *Pacific Surety Co. vs. Leatham, etc. Co.*, 151 Fed. 443, "the mere fact that the event (the accident) and measure of liability (proportionate part of seaman's wages) are referable to the charter party (contract of hiring) does not make the bond a maritime contract, nor make its obligation maritime in the jurisdictional sense." That was a case similar in its principles to the principles we are considering. There an attempt was made to enforce in the admiralty the liability of a surety who had guaranteed the performance of the terms of a charter party, and the court decided the contract of suretyship was not within the jurisdiction of the admiralty. The conclusions of the court are (p. 443):

" 'The contract 'must be, *directly and in essence*, an obligation maritime in its nature, for the performance of maritime service or transactions, to confer jurisdiction;'

" 'The direct subject matter of the suit is the covenant to pay such damages, which neither involves maritime service nor maritime transactions; and we are of the opinion that the mere fact that the event and measure of liability are referable to the charter party does not make the bond a maritime contract, nor make its obligation maritime in the jurisdictional sense.'

Here the obligation of employers to compensate injured employees is imposed by the state. It is distinct from the obligation of the employer to pay the employee

for whatever services he may render, and is non-maritime in the jurisdictional sense. The only matters here requiring adjudication are the making of the contract of hiring under the law and that the employee comes within the conditions specified in the statute.

The case of *The Pennsylvania*, 154 Fed. 9, also illustrates the point that the obligation is non-maritime. That was a case where a corporation was organized to conduct a boys' school on shipboard, chartered a vessel for the purpose, and also entered into contracts with libelants, by which it engaged to take pupils for the school year, who were to be received on board and taught the ordinary studies of a preparatory course. During the year, the ship was to make a voyage to foreign countries, and the pupils were to be organized into a cadet corps and given instructions in nautical and naval matters. The court said (p. 12, *et seq.*):

"Whenever the principal subject-matter of a controversy belongs to the jurisdiction of a court of common law, or of equity, the incidental matters must also be relegated to the appropriate jurisdiction, notwithstanding of themselves they might be cognizable in admiralty. *Kellum vs. Emerson*, 2 Curt. 79, Fed. Cas. No. 7,669; *Grant vs. Poillon*, 20 How. 162, 15 L. ed., 871; *Minturn vs. Maynard*, 17 How. 477, 15 L. ed. 235; *Hull vs. Hudson*, 2 Sprague, 65 Fed. Cas. No. 5935; *Vandewater vs. Mills*, 19 How. 82, 15 L. ed. 554.

"In *Plummer vs. Webb*, 4 Mason, 380 Fed. Cas. No. 11233, Judge Story had occasion to consider a somewhat similar question in a case where a minor had been apprenticed by his parent for a voyage to sea, and had received improper treatment by the master of the vessel. Judge Story said:

"I can not say that the *whole* contract is here of a maritime nature. There are mixed up in it *obligations ex contractu not necessarily maritime*, and so far the contract is of a special nature. In cases of a mixed nature, it is not a sufficient foundation for admiralty jurisdiction that there are involved some

ingredients of a maritime nature. The substance of the whole contract must be maritime.' ”

So, the obligation here does not come within the admiralty jurisdiction.

The views expressed here have been sustained by the decisions of several courts of last resort. All the questions involved are exhaustively considered by the Supreme Court of Minnesota in holding the compensation law of that State applied where an employee engaged in the work of unloading the vessel, and occupied on the vessel, in the port of Duluth, suffered injury through the negligence of the defendant.

Lindstrom v. Mutual S. S. Co., (Minn.) 156 N. W. 669.

See also *Kennerson v. Thames Towboat Co.*, (Conn.) 94 Atl. 372;

Stoll v. Pacific S. S. Co., (D. C. Wash.) 205 Fed. 169.

Walker v. Clyde S. S. Co., (N. Y.) 109 N. E. 604.

Contra, Schuede v. Zenith S. S. Co., (D. C. Ohio) 216 Fed. 566.

It is respectfully urged that the court in the case last cited took an erroneous view of the law from two standpoints:

1. The court fell into the error of not distinguishing between the exclusive maritime jurisdiction for the purpose of enforcing liens maritime against the *res* in accordance with the maritime law, and those rights which, although relating to ships and to navigable waters, “can no more be deemed to be cases of admiralty and maritime jurisdiction than cases of common law jurisdiction.” (*Taylor v. Carryl*, 61 U. S. 583, to which no reference is made in the *Schuede* case.)

2. The matter was treated as if, under the saving clause, the suitor goes “into a court of law to find a new

remedy", which is not the situation at all. As demonstrated, he merely avails himself of his familiar right to proceed *in personam* against a defendant.

Proposition 3: There is No Denial of the Equal Protection of the Law.

The occurrence of concurrent jurisdiction does not contravene the provision of the federal statute requiring equal protection of the laws. There has always been concurrent jurisdiction. This cannot be made plainer than by reference to the clear and explicit statement of the New York court in the case of *Walker v. Clyde S.S. Co.*, 109 N. E. 604, as follows:

"But it is argued that the act purports to grant exemption from further liability to those who comply with it, and that as such exemption is not effectual in the case of employers whose property may be proceeded against in admiralty, it is as to them a denial of equal protection of the law. The exemption, however, is from suits at common law, of which all employers complying with the act equally have the benefit. If another remedy remain, it results from the nature of the case, and not from any attempt at discrimination on the part of the legislature. All of the same class are treated alike. Employers in the situation of the appellant are subjected to two remedies now, precisely as they were before the passage of the act."

It is therefore respectfully submitted that the New York Workmen's Compensation Statute may be operative and may be administered by the constituted state authorities, in maritime injury and death cases, without encroaching upon constitutional admiralty jurisdiction, and without denial of the equal protection of the law.

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FILED

FEB 24 1916

JAMES D. MAHER

CLERK

Supreme Court of the United States,

OCTOBER TERM, 1915.

No.



280

SOUTHERN PACIFIC COMPANY,

Plaintiff-in-Error,

against

MARIE JENSEN,

Defendant-in-Error.

In Error to the Supreme Court, Appellate Division,
Third Department, of the State of New York.

BRIEF OF PLAINTIFF-IN-ERROR

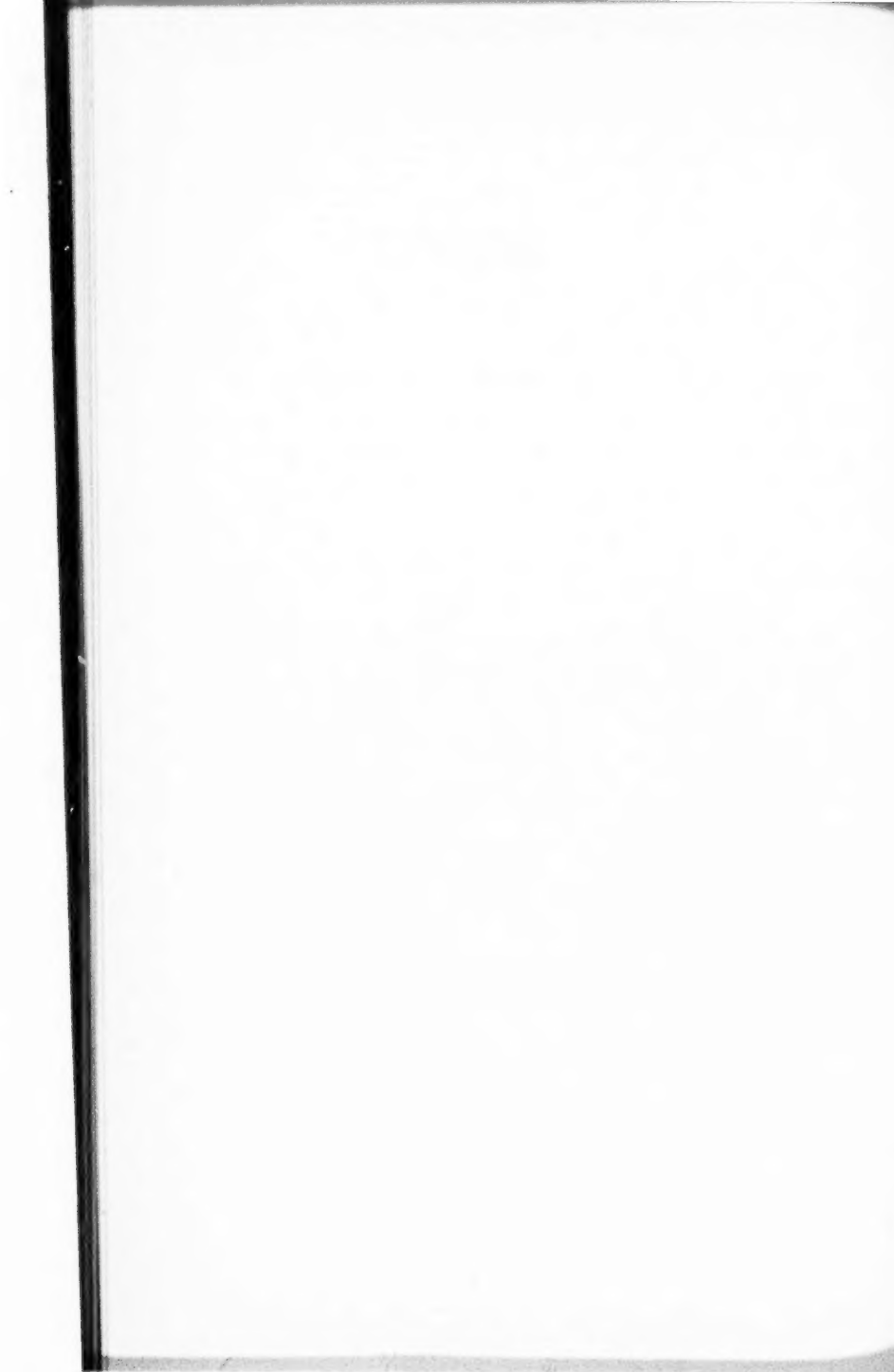
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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 700.

SOUTHERN PACIFIC COMPANY,
Plaintiff-in-Error,

against

MARIE JENSEN,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT, OF THE STATE OF NEW YORK.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement of the Case.

This cause involves the constitutionality of the Workmen's Compensation Law of the State of New York.

This proceeding was begun by the defendant-in-error to obtain compensation for the death of her husband under the provisions of the New York Workmen's Compensation Law by the filing of a claim for compensation with the State Workmen's Compensation Commission, a body established for the administration of that law (p. 1). The Commission after a hearing made its findings of facts which are on pages 8 and 9 of the Record.

From the findings it appears that Christen Jensen was

killed on August 15, 1914, while in the employ of the plaintiff-in-error, the Southern Pacific Company. Jensen's work consisted in operating a small electric freight truck upon which cargo was carried out of the Company's steamship EL ORIENTE over a gangway, thence to the pier. In some way Jensen jammed the truck against the guide pieces on the gangway and then, instead of backing his truck slowly until it became released, he proceeded backward at full speed into the port in the side of the vessel. He failed to lower his head as he did this, and his head struck the ship along the top line of the port and his neck was broken.

The vessel was at the time lying in navigable waters of the United States about 10 feet from pier 49, North River, New York City. The cargo on the vessel which Jensen was engaged in discharging had come from Galveston, Texas. The only business done by the Southern Pacific Company in New York is the carrying of passengers and merchandise in interstate commerce.

The Southern Pacific Company is a common carrier by railroad.

At the hearing before the Commission the plaintiff-in-error urged that this claim did not come within the terms of the Compensation Law (p. 10) because

1. The accident took place on board a vessel owned by a foreign corporation and when both workman and employer were engaged solely in interstate commerce;
2. The injury was one with respect to which Congress may and has established a rule of liability and under section 114 the law had no application;
3. The workman was injured in the operation of a vessel of another state engaged in interstate commerce, while the law applies only to those engaged in the operation of a New York vessel (Sec. 2, Group 8).

The plaintiff-in-error also urged that the law as applied to this injury was contrary to the Constitution of the United States because

1. It takes property without due process of law;
2. It constitutes a regulation of and burden upon interstate commerce;
3. It denies the plaintiff-in-error the equal protection of the laws because it does not afford an exclusive remedy to this employer, but leaves it and its vessels subject to suit in admiralty.
4. The plaintiff-in-error also urged that the law conflicted with the rule of liability established by Congress [The Federal Employer's Liability Act].

The Commission overruled all the objections and awarded compensation of \$5.87 per week to the widow during widowhood (with two years' compensation in case of remarriage) and compensation of \$1.96 per week to each of the two children until they should reach the age of eighteen. One hundred dollars funeral expenses was also awarded.

Pursuant to section 23 of the law, the employer appealed from the award or decision of the Commission to the Appellate Division of the Supreme Court, Third Department. The award was there confirmed without opinion (pp. 11, 12).

The employer then appealed to the Court of Appeals, where the order of the Appellate Division was affirmed and the record was remitted to the Appellate Division of the Supreme Court, Third Department (pp. 14, 15). Thereupon the employer sued out its writ of error in this Court.

The opinion of the Court of Appeals, written by Judge Miller, begins on page 16 of the Record, and is reported in 215 N. Y. 514.

Specification of Errors.

Plaintiff-in-error contends that the Court of Appeals erred in not deciding that

1. The New York Workmen's Compensation Law is contrary to the Constitution of the United States, in that it takes plaintiff-in-error's property without due process of law;

2. The New York Workmen's Compensation Law is unconstitutional, in that it constitutes a regulation of and burden upon interstate commerce;

3. The Workmen's Compensation Law is unconstitutional, in that it denies the plaintiff-in-error the equal protection of the laws because it does not give to employers of men working on shipboard the freedom from further liability for injuries to workmen that is accorded to other employers;

4. The Workmen's Compensation Law when applied in this case is in conflict with the Federal Employers' Liability Act.

(Assignments of Error, pp. 26, 27.)

Brief of Argument.

1. The New York Workmen's Compensation Law deprives the plaintiff-in-error of property without due process of law, in violation of the fourteenth amendment of the Constitution of the United States.

2. The New York Workmen's Compensation Law denies this plaintiff-in-error the equal protection of the laws because, although it complies with the Compensation Law, it is not freed from further liability to workmen injured on shipboard, but remains liable to suits in admiralty.

3. The New York Workmen's Compensation Law imposes a direct and unconstitutional burden upon the interstate commerce transacted by the plaintiff-in-error.

4. Congress, by the Federal Employers' Liability Act of 1908, has dealt with and assumed exclusive jurisdiction over the field of compensation payable for injuries received by the employee of a common carrier by railroad while both employer and employee are engaged in interstate commerce.

The New York Workmen's Compensation Law.

The law,* after defining forty-two groups of industries to which it applies, provides in section 10 as follows:

“Liability for Compensation.—Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty.”

It is provided that the liability thus prescribed shall be exclusive unless the employer fails to secure the payment of such compensation in the manner required by the law (Sec. 11).

* Chapter 816 of the Laws of 1913, as reenacted and amended by chapter 41 of the Laws of 1914, constituting chapter 67 of the Consolidated Laws, as amended by chapter 316 of the Laws of 1914. The law has been further amended by chapters 167, 168, 615 and 674 of the Laws of 1915.

The option is given the employer to secure such compensation by paying premiums to the State and thus insuring in the State fund, to insure with insurance companies, or to carry his own insurance (Sec. 50).

For failure to pay or provide compensation the employer, in addition to being liable to a suit by the injured employee, with the ordinary common law defenses abolished, or liable for compensation at the workman's election (Sec. 11), is liable to a penalty equal to the *pro rata* premium which would have been payable for insurance in the State fund during the period of non-compliance with the Law (Sec. 50).

In Section 15 of the Law is a schedule setting forth the amount of compensation payable to the employee for various kinds of disability therein specified; and in Section 16 is provided the compensation payable to the representatives of deceased workmen.

In addition to the payment of compensation the employer must furnish the employee with such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or requested by the employee during sixty days after the injury (Sec. 13), and in case of the death of the employee, the employer must pay the reasonable funeral expenses (Sec. 16).

It is presumed that all claims made for compensation come within the law and that sufficient notice has been given in the absence of substantial evidence to the contrary (Sec. 21). The right of compensation is preferred without limit of amount against the assets of the employer (Sec. 34).

The amount of the compensation depends upon the extent of the disability and the average earnings of the workman (whether the earnings are from the present employer or not) if he has worked steadily in the employ-

ment in which he was injured, but otherwise upon his earning capacity as measured by the earnings of those who have worked in the same trade. In case of death it depends also upon the number of legal dependents and the length of time they live (Sees. 14-16).

The only alternative that the employer has to the payment of the arbitrary sums specified in the schedules of the law is to pay to the State Fund or to some insurance company a premium of from a fraction of 1 per cent. to about one-third of the payroll.

Certain features of the operation of the law may here be pointed out.

(a) The law imposes no rule of conduct upon the employer with respect to conditions of labor in the various industries covered by the law. It imposes no duty with regard to the place where the workmen shall work, the character of the machinery, tools or appliances to be used, the rules or regulations to be promulgated for the safety of those employed in and about the industry. It prescribes no safeguards or safety appliances. There is not a word in the law dealing with the health, comfort, or safety of the employee, or the conditions of labor.

(b) It imposes liability on the employer although he is carrying on a lawful business in a lawful manner, although he has used every precaution that human foresight and ingenuity can devise, although the accident was caused by the wrongful act of a third party or by *vis major*. The Court of Appeals has said:

“Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made.” *Winfield v. New York Central etc., R.R. Co.*, 216 N. Y. 284, 289.

(c) It imposes liability upon the employer to pay com-

pensation to the employee for injuries caused solely by the negligence of the employee himself, no matter how gross.

(d) The amount of money that is taken from the employer to compensate the employee, is arbitrary, and is not based upon the actual damage suffered or loss sustained by the injured employee.

(e) There is no limitation upon the period of time for which compensation for permanent total disability or death must be paid. Compensation is payable so long as the injured man or the designated dependents live.

(f) While the law purports to deal with those engaged in hazardous employments, nearly all the recognized industries are included within the law. Substantially all employments are thus declared hazardous, whether they are so in fact or not.

(g) The mere filing of a claim for compensation puts upon the employer the burden of disproving the claim by substantial evidence. Jurisdictional facts including the fact of notice are presumed (Sec. 21).

(h) The law has been held to be extra-territorial in its operation. It applies to injuries happening outside the State as well as to injuries happening within the State. *Matter of Post v. Burger*, 216 N. Y. 544.

(i) The law is compulsory on all employers engaged in the classes of business to which it applies. The employer has no election to pay compensation or to be liable to suit with the common law defenses abolished, as he has under most other workmen's compensation laws. If he refuses to comply with the provisions of the law, he is not only penalized and liable to a common law suit with the common law defenses abolished, but at his employee's election he is also liable for the compensation provided in the law.

The History of Workmen's Compensation Laws in New York.

In 1910 the New York Legislature passed a workmen's compensation law (L. 1910, ch. 352) whereby, with the consent of the employer and the employee, specified sums should be paid to injured workmen in lieu of other compensation.

Later the same year there was also passed a compulsory compensation law applicable to a few extra-hazardous employments, which required the employer to pay compensation to the injured employee, without regard to fault (L. 1910, ch. 674). The Court of Appeals in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, held this compulsory law contrary to the constitutions both of the State of New York and of the United States, as taking property without due process of law.

The due process clause of the State Constitution

"No person shall . . . be deprived of life, liberty or property without due process of law" (Art. 1, sec. 6),

was substantially the same as the similar guarantee in the 14th Amendment to the Constitution of the United States:

"Nor shall any State deprive any person of life, liberty or property, without due process of law."

In holding that the due process clauses of both the Federal and the State Constitutions were violated by the compensation law involved in the *Ives* case, the Court said at pages 293, 294:

"One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers

enumerated in the new statute, and as to them it provides that they shall be liable to their employees for personal injury by accident to any workman arising out of and in the course of the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment or one inherent in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and wilful misconduct of the injured workman. It is conceded that this is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head."

And again at page 298:

"We conclude, therefore, that in its basic and vital features the right given to the employee by this statute, does not preserve to the employer the 'due process' of law guaranteed by the Constitutions, for its authorizes the taking of the employer's property without his consent and without his fault."

Of the argument in support of the constitutionality of the law under the police power, the Court said:

"In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government" (p. 301).

Then applying these principles to the law before it, the court proceeded:

"It does nothing to conserve the health, safety or morals of the employees, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employee, except where the latter fault is such as to constitute serious and willful misconduct. Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health and morals of his employees, is liable in damages to any employee who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employee himself" (p. 302).

The constitution of the State was thereafter amended so as to empower the Legislature to pass a compensation law (Constitution of New York, Art. I, sec. 19, in effect Jan. 1, 1914). Late in 1913 the Legislature enacted the compulsory workmen's compensation law involved in this cause (L. 1913, ch. 816) and in 1914 it reenacted the same law (L. 1914 ch. 41).

The constitutionality of this law was challenged in the case at bar, and the Court of Appeals upheld the law.

The workmen's compensation law which was considered in the *Ives* case was in its general scheme similar to the present law, although its provisions were far less drastic. The present law covers all injuries arising out of and in the course of the employment; the earlier law covered such injuries only when due to a necessary or inherent danger of the employment, or when due to the employer's fault. Under the earlier law, the employer

was not entitled to compensation when the injury was caused in whole or in part by the serious and willful misconduct of the workman; under the present law the workman is not debarred unless the injury is occasioned by the willful intention of the workman to injure or kill himself or another or results solely from his intoxication while on duty. The scale of compensation was lower under the earlier law and that law applied only to eight groups of occupations which were in fact extra-hazardous, while the present law applies to nearly all the recognized industries.

The Court of Appeals in the *Ives* case held that the scheme of compensation provided in the earlier law, however desirable as an economic principle, was inconsistent with our form of government and unconstitutional because it resulted in compelling an employer, without his fault and without his consent, to compensate an employee for his injuries.

The Court of Appeals in upholding the constitutionality of the present law did not express the opinion that the *Ives* case was wrongly decided; it attempted to distinguish its earlier decision. Although apparently conceding that the underlying theory of the two laws was the same, it thought that there was such a fundamental distinction between the law under consideration in the *Ives* case and the present compensation law that the decision in the *Ives* case was not controlling.

The first distinction which the Court suggested is that the former law

“made the employer liable in a suit for damages though without even imputable fault and regardless of the fault of the injured employee, short of serious and wilful misconduct. This act protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation of all cases and

from the certainty of defeat if unable to establish a case of actionable negligence" (p. 20).

This suggested difference is not a difference between the unconstitutional compensation law considered in the *Ives* case and the present law, but is a distinction between a system of liability and a system of compensation. The law involved in the *Ives* case, no less than the present law, was a compensation law. The former law required the employer

"to pay compensation at the rates set out in section two hundred and nineteen-a."

The present law requires the employer to

"pay or provide * * compensation according to the schedules of this article."

As the former law fixed the *amount* of compensation, extravagant or insufficient verdicts under that law were no less impossible than under the present law. As the compensation was payable although the employer was not at fault, "certainty of defeat if unable to establish a cause of actionable negligence" was as impossible under that law as under this law.

Disputes arising under the former law were to be determined either by arbitration or by an action at law (Sec. 219d). Under this law disputes are determined by the Commission, with an appeal from its decision to the courts. The fact—if it be a fact—that under the present law the workman may experience less delay in obtaining compensation by pressing his claim before the Commission than he would have experienced under the former law can hardly be a ground of distinction in favor of the present law when its constitutionality is being questioned by the employer.

The next distinction which the Court makes is that the former law made no attempt to distribute the burden of

paying compensation, whereas the present law aims to distribute the burden in proportion to the risk over the industries affected. A requirement of insurance against a liability can hardly be urged as justification for the imposition of that liability. The liability imposed by the former law was of the same character as that imposed by the present law—a liability to pay compensation irrespective of fault. That liability was held to be beyond the power of the State to impose. When the State again attempts to impose such a liability how can it be urged that the objection to the State's lack of power can be met by requiring the employer to insure that liability which the State is without power to impose?

FIRST POINT.

The New York Workmen's Compensation Law deprives the plaintiff-in-error of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

This Court has not yet considered the constitutionality of a State compulsory workmen's compensation law under the due process clause. An optional law applying to employers of five or more workmen was before it in *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571, 577, but, as the Court there pointed out, under that law "no employer is obliged to go into this plan. He may stay out of it altogether if he will." And in that case the employer had stayed out of the plan. The sole question presented in that case was whether "the classification of employers and employees created by the act is arbitrary and unreasonable" (p. 575). The question involved here did not and could not arise in that case.

A compulsory compensation law was before this Court in *Northern Pacific Ry. Co. v. Meese*, 239 U. S. 614, but the constitutionality of that law under the due process clause was not involved. There the question arose whether the United States District Court for one of the Districts of Washington was right in holding that the Washington law had repealed the death statute as to an employee suing a third party for an injury received at the plant (206 Fed. 222), or whether the Circuit Court of Appeals was right in holding that the death statute was not repealed under those circumstances (211 Fed. 254). As the Supreme Court of the State of Washington (*Peet v. Mills*, 76 Wash. 437) had placed the former construction upon the law this Court reversed the decision of the

Circuit Court of Appeals and affirmed the action of the District Court, because, as was said by Mr. Justice McReynolds:

“It is settled doctrine that Federal Courts must accept the construction of a State statute deliberately adopted by its highest court.”

The only constitutional question involved was whether the abolition of the right of action for death in certain cases constituted a denial of the equal protection of the laws. Of this the Court said:

“Respondents’ suggestion that the construction of the act adopted by the trial court would cause it to conflict with the equal protection clause of the Fourteenth Amendment, is without merit. They have raised no other question involving application of the Federal Constitution.”

In the state courts there have been several decisions upon the constitutionality of compulsory compensation laws. The first compulsory compensation law of New York was, as we have seen, held unconstitutional in *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271. A Kentucky law, optional in form, but deemed to be compulsory in fact, was overthrown in *Kentucky State Journal v. Workmen's Compensation Board*, 161 Ky. 562 (170 S. W. 1166), rehearing denied 162 Ky. 387 (172 S. W. 674), and the partially compulsory Texas law was declared unconstitutional in *Middleton v. Texas Power & Light Co.*, (Texas Court of Civil Appeals) 178 S. W. 956.

On the other hand, the Washington Compensation Law was upheld by the State Court in *State v. Clausen*, 65 Wash. 156 (117 Pac. 1101), although its constitutionality is now challenged in this court, *Mountain Timber Co. v. Washington*, No. 49, October Term, 1915. The California law was sustained by a divided Court in *Western Indemnity Co. v. Pillsbury*, (Supreme Court of California), 151

Pac. 398, largely upon the authority of the *Clausen* case, and the case now under review.

As this Court has not passed upon the constitutionality of any compulsory compensation law under the due process clause of the Constitution we must look to the principles which it has laid down in its interpretation of that clause in other cases. "Due process of law," we find to be substantially equivalent to "the law of the land." Of the words, "due process of law," this Court said in *Dent v. West Virginia*, 129 U. S. 114, 123:

"They were deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case."

In ascertaining whether legislation meets with the due process requirement,

"We must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee v. Hoboken Land Co.*, 18 How., 272, 277.

In *Lowe v. Kansas*, 163 U. S. 81, 85, the Court said:

"Whether the mode of proceeding, prescribed by

this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases."

In *Twining v. New Jersey*, 211 U. S. 78, 101, the Court said:

"Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."

In *Holden vs. Hardy*, 169 U. S. 366, 390, the Court said:

"It is certain that these words [due process of law] imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defence."

What has hitherto been the settled mode of requiring from one person compensation for injury sustained by another is that the person whose property is sought to be taken have an opportunity to be heard upon the question of his fault before he has been condemned. He has had opportunity to defend himself by showing that the accident occurred through inevitable accident or through the fault of those for whom he is not responsible. He has been allowed to show that the person seeking compensation is himself solely responsible for the damages sustained. He has been allowed to show what sum of money will work a complete *restitutio in integrum* to the injured person.

The system which this law inaugurates is entirely at variance with what has always heretofore been the universal method of administering justice. Not only is there a departure from forms of procedure, but the very basis of the liability is one unknown to the common law and never until recently suggested in any country where by written constitution government is forbidden to take property without due process of law.

"While the methods by which justice is administered are subject to constant fluctuation," even under our written constitutions, "the cardinal principles of justice are immutable." *Holden vs. Hardy*, 169 U. S. 366, 387.

A cardinal principle of justice and a fundamental principle of our law sanctioned by the decisions of this Court is that, with certain historical exceptions, liability cannot be imposed without fault, and that the loss in case of inevitable accident must lie where it falls.

This Court said in *City of Chicago v. Sturges*, 222 U. S. 313:

"It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall."

In *St. Louis I. M. & S. Ry. Co. v. Wynne*, 224 U. S. 354, 360, this Court held unconstitutional a statute that

"takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right," because "plainly this cannot be done consistently with due process of law."

In *Chicago, R. I. etc. Ry. Co. v. Zerneck*, 183 U. S. 582, 586, the Court said:

"The specific contention is that the Company is

deprived of its defence, and not only declared guilty of negligence and wrongdoing without a hearing, but, adjudged to suffer without wrongdoing, indeed for the crimes of others which the Company could not have foreseen or have prevented. Thus described, the statute seemed objectionable."

This principle has also been frequently recognized in the State Courts. In states in which there is no law requiring railroad companies to fence their lines, statutes imposing an absolute liability upon railroad companies for stock killed by trains, irrespective of fault, have uniformly been declared unconstitutional.

Joliffe v. Brown, 14 Wash. 155;
Oregon Ry. & Nav. Co. v. Smalley, 1 Wash. 206;
Birmingham Mineral Co. v. Parsons, 100 Ala. 662;
Zeigler v. South & North Alabama R.R. Co., 58 Ala. 594;
Bielenberg v. Montana U. Ry. Co., 8 Mont. 271;
Thompson v. Northern Pacific R.R. Co., 8 Mont. 279;
Denver & Rio Grande v. Outcalt, 2 Colo. App. 395;
Sweetland v. At. T. & S. F. R.R. Co., 22 Colo. 220;
Schenck v. Union Pac. Ry. Co., 5 Wyo. 430;
Jensen v. Union Pac. Ry. Co., 6 Utah, 253;
Atchison & Neb. R.R. Co. v. Baty, 6 Neb. 37;
Catril v. Union Pac. R.R. Co., 2 Ida. 576.

Likewise, a statute requiring a carrier to bury at its expense persons dying while on its cars, or killed by collision, was held unconstitutional because it attempted to impose a liability where the railroad company violated no law and had been guilty of no negligence. *Ohio & Miss. R. Co. v. Lackey*, 78 Ill. 55.

The New York Workmen's Compensation Law strikes at the very fundamentals of constitutional freedom of

contract. Of this fundamental right this Court said in *Coppage v. Kansas*, 236 U. S. 1, 14:

“The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense.”

There and in the case of *Adair v. U. S.*, 208 U. S. 161, this Court protected the right to buy labor without interference, and it protected the right to sell labor without interference in *Truax v. Raich*, 239 U. S. 33, 41, where it was said:

“It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure.”

The Court of Appeals has said that the compensation law should be construed

“to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the Act for a disability or the death of the employee as therein stated.” *Matter of Post v. Burger*, 216 N. Y. 544, 554.

Without the consent and against the objection of the employer a “contract” is forced upon him to pay arbitrary sums to employees injured accidentally, by the fault of strangers, and even by the fault of the workman himself; and upon the employee is forced a “contract” to give up all claims against the employer except for com-



pensation. This interference with the use of labor in the conduct of business is far more substantial than that condemned in the *Coppage* case.

The law, then, takes the property of the employer without his fault and without his consent to aid employees suffering injury through pure accident, through the wrong of third parties and through their own wrong. It deprives the employee of his right to full indemnity for wrong suffered at the hands of his employer or those for whom the employer is responsible. It deprives the employer of the right to make use of labor except upon condition that he pay the workman or his dependents arbitrary sums in the event of accident, and it prohibits the employee from selling his labor except upon condition that he give up his right to be compensated for the consequences of the employer's fault, receiving only such arbitrary sum as the legislature has seen fit to grant him.

APPARENT EXCEPTIONS TO THE PRINCIPLE OF NO LIABILITY WITHOUT FAULT.

The Attorney General in his argument in the Court of Appeals referred to various instances of what he considered the imposition of liability without fault. The first instance suggested was the responsibility of the master for the act of his servant.

That doctrine, whatever its explanation or origin, was a part of the common law long before the adoption of our Constitution. "The English law has recognized that maxim [*qui facit per alium facit per se*] as far back as it is worth while to follow it." *Holmes on the History of Agency*, Vol. 3, *Select Essays in Anglo-American Legal History*, 368, 370).

Nor is this a liability created without fault. The doctrine merely places the responsibility for the wrongful act of the servant upon the master as well. The furthest possible

extension of the doctrine of *respondeat superior* by doing away with the fellow-servant rule, assumption of risk, and making the master responsible to all persons for all damages caused under any circumstances by the fault of his servant, falls far short of the imposition of an absolute liability irrespective of fault, or the imposition upon one person of liability for damages suffered by another person solely because of his own fault.

Reference was made by the Attorney General to sections 4585 *et seq.* of the U. S. Revised Statutes (now repealed) providing that there should be collected from every vessel 40 cents per month for every seaman employed on the vessel, the money to be used for the relief of sick and disabled seamen. The tax laid by these sections while payable by the master of the vessel was a tax upon the seamen for the benefit of the seamen. The master was authorized to retain the amount of the tax from the wages of the seamen. It at most required the seamen to co-operate in advance for their own relief in the event of sickness. It is well settled that the cost of benefits accorded by the State to a particular class can be collected from the class so benefited. In any event, the tax was well within the power of Congress to regulate commerce.

Statutes such as the one before this Court in *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, making railroads liable without regard to negligence for damages caused by fire, present only an apparent exception to the rule. The railroad company was made liable only for its own acts. It was liable only for property destroyed by fire communicated from its locomotive engines, not for the acts of strangers or of the adjacent property owner. The statute in effect treated the acts of the Railroad Company in communicating fire by their engines as acts of trespass for which they were liable to third parties whose property rights were thus invaded.

The real purpose of such statutes, as is pointed out in *Atchison, Topeka, etc., R.R. Co. v. Matthews*, 174 U. S. 96, 98, is

“to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is ‘caused by the operating’ of the road.”

Especially should this high degree of care be exacted of railroad companies to which the State has given the right of eminent domain and who can therefore operate their fire-scattering instrumentalities against the will of others owning property alongside their right of way.

But whatever the present justification of the rule of liability for escaping fire and regardless of whether it now fits into our scheme of law, the real explanation of the doctrine is historical. It is an early common law doctrine, which seems to exist in England even to-day, except as clearly altered by statute. *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 6. Liability for fire irrespective of negligence, therefore, was a part of “the law of the land” long before the adoption of the constitution, and the imposition of such a well-recognized liability was very properly held not to be a taking of property without due process of law.

Reference was made to the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, upholding the constitutionality of the civil damage act making a landlord who knowingly leases his premises for saloon purposes liable for losses resulting from intoxication caused by the sale of liquor by his lessee. The act was passed as its title indicates “to suppress intemperance, pauperism and crime.” As the Court pointed out, the liquor traffic was one which the Legislature “may not only regulate, but it may prohibit it” (p. 520). Possessing that power the State might

prohibit the leasing of buildings to be used for selling liquor, or if it chose, instead of prohibiting leases for such purposes, might allow them only upon condition that the lessor indemnify those suffering damages through the sale of the liquor on the leased premises.

Another case relied upon was *Chicago, R. I. & P. Ry. Co. v. Zerneck*, 183 U. S. 582, where a state statute made railroad companies liable for personal injury to passengers while being transported over its road.

That statute, Section 3 of the act under which the Railroad Company was incorporated provided:

“Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice.”

This Court said at page 588:

“We think plaintiff-in-error is precluded from objecting to the rule of liability expressed in section 3. That rule of liability was accepted by plaintiff-in-error as a part and as a condition of its charter.
* * * That liability, we repeat, plaintiff-in-error accepted with its incorporation, and cannot now complain of it.”

Reliance is placed by the defendant-in-error upon the principle allowing maintenance and cure to a seaman falling sick or becoming injured in the service of a vessel. *The Osceola*, 189 U. S., 158. This has always been held to be a contract liability, one of the provisions of the seaman's contract of employment. The contracts and services of seamen have always been considered exceptional in character. As was said by Mr. Justice Brown in *Robertson v. Baldwin*, 165 U. S., 275, 282,

“The contract of a sailor has always been treated

as exceptional and involving to a certain extent the surrender of his personal liberty during the life of the contract."

The peculiarities of conditions at sea are such as to justify a different relation between master and servant from that obtaining on land. The right of the master to place in irons a seaman who refuses obedience could hardly be urged in defense of a state statute allowing an employer on land to place in irons an employee refusing obedience and the existence of this right in nowise weakens the force of the constitutional guaranty of liberty. Whatever may be the explanation of this principle, it was a part of the admiralty law long before the adoption of the constitution.

The liability of the husband for the torts of the wife is another illustration not of liability imposed without fault, but of responsibility for fault being placed upon one who would not ordinarily be deemed responsible. The historical explanation of this doctrine is largely based upon the fiction of the identity of the husband and wife and the presumption, which, perhaps, accords less with the facts to-day than it did when the doctrine originated, that the wife acts under the command or coercion of her husband.

COMPULSORY INSURANCE IS NOT A JUSTIFICATION OF LIABILITY WITHOUT FAULT.

The Court of Appeals laid considerable stress upon the insurance feature of the present law, not only in attempting to distinguish its decision in the *Ives* case, but as in itself a justification under the principles laid down by this Court in *Noble State Bank v. Haskell*, 219 U. S. 104. The approval by this Court of the compulsory insurance system among banks created by the law under consideration in that case seemed to the Court of Appeals

to make it reasonably certain that this Court would sustain the present law.

Before considering the *Haskell* case it may be observed that the insurance feature of the Workmen's Compensation Law is a mere incident to the primary purpose of the law which is the imposition upon the employer of liability without fault. This is apparent from the language of §10 of the law entitled "Liability for Compensation:"

"Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation . . ."

and of §50, entitled "Security for payment of compensation:"

"An employer shall secure compensation to his employees in one of the following ways . . ."

The purpose of requiring insurance except in cases where the employer is able to furnish "satisfactory proof to the commission of his financial ability to pay such compensation for himself" is obviously to safeguard the employee, and not to distribute the burden imposed upon the employer.

But even were the law designed and calculated to afford protection to the employer by the establishment of a State insurance fund in which he is permitted to insure, or, if he is unable to make a satisfactory financial showing, is required to insure, still the constitutional objections to the scheme are in no way answered by any principle laid down in the *Haskell* case.

The law under consideration there applied only to corporations of Oklahoma, whose charters were subject to alteration and repeal (p. 110). The business to which the law applied—banking—has always been regulated in the public interest, and this Court held that this regulation could extend even "to prohibition except upon such

conditions as it [the State] may prescribe." As was pointed out on the motion for rehearing (219 U. S. 575, 580):

"In this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition of keeping on from corporations created by the State."

This plaintiff-in-error is a Kentucky corporation. The State of New York cannot alter, amend or repeal its charter. As its sole business in this State is interstate commerce, the State cannot prohibit its carrying on that business absolutely, nor upon such conditions as it might choose to prescribe. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *West v. Kansas Natural Gas Co.*, 221 U. S. 229.

Laying aside these considerations, however, the *Haskell* case is far from a decision in favor of this legislation. The insurance scheme considered in that case had for its object the payment by banks of their just debts. The banks were required merely to go into a scheme of mutual cooperation for the guarantee to the depositor of the payment of those just obligations. There is no intimation that those banks could be required to contribute premiums to a fund to be used for pensions to bank clerks or to aid depositors who had met with misfortune. Yet the Court of Appeals defends the compensation law as a scheme "to secure injured workmen . . . from becoming objects of charity" (p. 21). There is no suggestion that an invalid obligation attempted to be imposed upon the banks would be made valid by the fact that this obligation was not required to be paid by one bank in one lump sum, but, by means of an insurance scheme, was to be paid by all of the banks in small installments.

If the law now under consideration confined itself to

the establishment of a system of compulsory insurance among employers against their liability for injuries caused to employees by the negligence of their employers some support might be found in the *Haskell* case. It is submitted, however, that that case affords no basis for the reasoning in a circle adopted by the Court of Appeals in attempting to justify the imposition of liability without fault because insurance is required against such liability.

The liability created by this law is one hitherto unheard of in any state or country having constitutional guarantees. The law upheld in the *Haskell* case did not create an unknown obligation. The device, as this Court observed, was a familiar one: "It was adopted by some states the better part of a century ago, and seems never to have been questioned until now" (p. 112). The *Haskell* case was in no way intended to indicate a departure from the principles theretofore laid down by this Court (p. 580).

THE POLICE POWER.

The only justification suggested for the taking of the employer's property by the Workmen's Compensation Law is the police power. In considering the extent of the police power an analysis of the objects in aid of which the police power may be put forth and of instances in which legislation passed under the guise of police regulations has been struck down, afford perhaps the best guidance.

We need not consider the familiar instances of the application of the police power in the interest of the public health, safety and morals, because, confessedly, to none of these objects is the present law addressed.

This Court has held that the police power of the state extends to the enactment of measures providing "a reasonable incentive for the prompt settlement without suit

of just demands." *Yazoo & Miss. etc. v. Jackson Vinegar Co.*, 226 U. S. 217, 219; *Missouri K. & T. Ry. Co. v. Cade*, 233 U. S. 642; *Kansas City Ry. Co. v. Anderson*, 233 U. S. 325; *Seaboard Air Line v. Seegers*, 207 U. S. 73. But it is equally well settled that the state cannot penalize the non-payment of what is not a valid obligation. *Chicago M. & St. P. Ry. Co. v. Polt*, 232 U. S. 165; *St. Louis I. M. & S. Ry. Co. v. Wynne*, 224 U. S. 354. The state may prohibit contracts in derogation of regulations lawfully established, *Chic. B. & Q. Ry. v. McGuire*, 219 U. S. 549; but cannot prohibit under the police power the making of contracts that conflict with no public interest. *Truax v. Raich*, 239 U. S. 33.

Bankers may be required to give bond to pay their just debts, *Engel v. O'Malley*, 219 U. S. 128, or may be forced before hand into a scheme of mutual cooperation to pay their debts, *Noble State Bank v. Haskell*, 219 U. S. 104, 112; but statutes will be struck down where their object or effect is to require the payment of money where there is no legal responsibility. *St. Louis I. M. & S. Ry. Co. v. Wynne*, 224 U. S. 354.

Laws limiting the hours of labor are justifiable, but only when the Court can see that they are passed in the interest of and reasonably subserve the public health. *Muller v. Oregon*, 208 U. S. 412; *Lochner v. New York*, 198 U. S. 45, 59.

Social legislation cannot be upheld where its object is to level inequalities of fortune or to restrict "the normal and inevitable result of their exercise." *Coppage v. Kansas*, 236 U. S. 1, 17, 18.

To sustain the law it is urged that there are many defects in the present system of compensating workmen injured in the course of their employment, and that it is widely believed that the best means of remedying this

condition is the adoption of a scheme requiring fixed compensation to be made to the employee regardless of fault. But general belief in the value of legislation does not advance us far when constitutional objections to that legislation are being considered. Numerous instances will be recalled of legislation passed in many of the states to meet evils the existence of which none would deny, and generally believed to be a proper method of dealing with these evils, but which has been held unconstitutional.

One example of such legislation is found in the so-called Blue Sky laws providing that sales of securities must first be approved by a state commission. Such laws have been enacted in at least six of the states. The Michigan law was held unconstitutional by three judges sitting as a district court in the case of *Alabama & N. O. Transportation Co. v. Doyle*, 210 Fed. 173. The Iowa law was similarly held unconstitutional in *Compton v. Allen*, 216 Fed. 537, and the West Virginia law in *Bracey v. Darst*, 218 Fed. 482.

There has been a wide-spread belief that the giving of trading stamps to increase sales was harmful, and that this practice should be suppressed. The prevalence of this belief is shown by the fact that such legislation has been adopted in the following states, namely: Alabama, California, Florida, Georgia, Massachusetts, Maryland, New Hampshire, North Carolina, Vermont, Virginia, Rhode Island, New York and Washington. All of these laws have been held unconstitutional. *Little v. Tanner*, 208 Fed. 605 (cases collected on page 610); *Van Deman v. Rast*, 214 Fed. 827.

Statutes such as the one struck down in *Coppage v. Kansas*, 236 U. S. 1, had been passed, when that case was decided, in fourteen of the States and in Porto Rico (*id.* p. 27).

The Attorney-General in his brief in the Court of Ap-

peals urged that modern industrial conditions make it difficult, if not impossible, to judge correctly the causes of a large proportion of accidents and that it is impossible to form a correct judgment without such expense and delays as will defeat justice. Granting the soundness of the Attorney-General's criticism of present conditions, the remedy would seem to lie in legislation aiming to correct these abuses, to do away with unnecessary delays in the Courts, to bring about more correct judgments and more complete justice; not legislation doing away with the very concept of justice itself. Even assuming that employers as a class will be required to pay under the compensation law no more than they were required to pay in the settlement and defense of personal injury suits before the passage of the law, and assuming that the compensation paid to workmen for injuries under the law is equal to or greater than the amount of compensation which they received before the passage of the Workmen's Compensation Law, can this be urged in defense of injustice to the individual employer, whose whole plant and whole fortune are wiped out by the carelessness of an employee, a stranger or by *vis major*? Or does this justify depriving a needy and worthy employee of the right to full and complete indemnity for damages sustained through the wrong of the employer?

Whatever may be the justification urged for the imposition upon the master of liability without fault, we submit that there can be no justification for depriving the employee, injured by the fault of the master, of his right to indemnity for the damages he has suffered. The workman by the compensation law is deprived of all right to recover for pain and suffering. He is deprived of his right to recover his full loss of earnings. He is wholly deprived of the right to damages for the first two weeks' disability. The fundamental principles of our law oppose such a result.

The employer is not here urging the grievance of the employee. As the Court of Appeals pointed out:

“Exemption from further liability upon paying the required premium into the State fund is an essential element of the scheme and if the Act be unconstitutional as to the employee, the employer would be deprived of that exemption and thus would be directly affected by the unconstitutionality of the Act in that respect” (p. 21).

To sustain the law, therefore, it is necessary to justify the taking of property not only from the employer but also from the employee. Unless this can be done the law must fail.

THE RESULTS OF COMPENSATION LAWS.

Turning to the facts in the case at bar we find that as a result of this accident the employer must pay to each of the two children an annuity of \$101.92 until they reach the age of 18, and to the widow an annuity of \$305.24 so long as she lives and does not remarry. The widow was 29 years old at the time of the accident and had an expectancy of 35 years. If compensation is paid to her throughout the period of expectancy and compensation is paid to the children until they reach 18 years of age the employer will have paid out over \$13,000.

Had Jensen been permanently totally disabled instead of being killed, and had he lived to reach the age of seventy, the law would have required of the employer an outlay of about \$16,000. With his wages \$100 a month and his age 20, the outlay would be about \$40,000—taken from the employer against whom no suggestion of fault has been made.

Taking a broader view of the outlay under compensation systems, we find that workingmen's insurance in Germany in 1911 cost “almost exactly 2,000,000 marks daily,” a sum which Dr. Ferdinand Friedensburg, for more than twenty

years President of the Senate in the Imperial Insurance Office, says "can now be characterized by nothing short of monstrous." (*Friedensburg, The Practical Results of Workingmen's Insurance in Germany*, p. 19). Under the new Government Insurance regulation it is said that Germany must "soon reckon with a burden of about 1,250,000,000 marks each year, laid upon our industrial activity simply and solely for purposes of social insurance" (*id.* p. 20). In 1911 the cost of insurance against accidents (resulting in more than four weeks' disability) in Austria amounted to nearly \$8,000,000, and applying the Austrian system at the same premium to employers in the United States the cost of workmen's compensation would amount to over \$382,000,000 per annum (*Bulletin No. 157, U. S. Dept. of Labor, Industrial Accidents Statistics*, March, 1915, p. 148).

We point out this result of the law to show the magnitude of the taking of property which is sought to be justified. It is not a slight restriction upon the employers' method of doing business that this law imposes; it is not a negligible contribution that is exacted from the employer: the law lays upon the employer burdens which the Legislature itself considers so onerous that it requires, except in exceptional cases, that the burden be insured.

The Attorney-General has urged in justification of the law that it tends to promote safety of workmen. It is difficult to see how this assertion is to be sustained. The law requires the employer to take no steps looking to the safety of workmen. It requires the employer ordinarily to insure. If the employer does insure he has no immediate interest in the safety of his employees, and in accident prevention. His share of the cost of preventable accidents will be less than the cost of installing safety appliances. The law not only imposes no duty of care upon the master,

but it removes a chief incentive to his exerting himself to safeguard his workmen.

The ascertainment of the causes of accidents and the fixing of responsibility becomes no longer of importance. The occasion of and the incentive to the formulation of rules of conduct after investigating accidents is done away with. This, again, cannot but militate against the interest of safety.

The workman as well as the employer is relieved from the consequences of his own fault and wrongdoing. A minor accident is no longer to be dreaded, and if possible avoided. Relieving the workman from responsibility for his own fault and wrongdoing cannot but result disastrously.

These consequences of a compensation system are matters not merely of theory, but of fact, as the experience of other countries under workmen's compensation laws shows.

Statistics prove that the number of accidents has greatly increased under compensation laws. In Switzerland the number of accidents per thousand workmen was 38.31 in 1888, and has steadily increased to 93.15 in 1902 (computed from Table 2, *Frankel & Dawson, Workmen's Insurance in Europe*, p. 75).

Austria's experience is similar. Accidents among full time workers have steadily risen from 19.49 per thousand in 1890 to 55.07 in 1900, 63.19 in 1906 (*id.* p. 123). The period of Italian experience given shows an increase of accidents per thousand insured from 72 in 1903 to 105 in 1905 (*id.* p. 88).

German experience for new, compensated accidents (of over 13 weeks' disability) shows an increase from 2.03 per thousand workmen insured in 1888 to 5.63 in 1900 and 6.77 in 1907 (*id.* p. 103). Reported accidents in Germany have increased from 28.04 per thousand workmen in 1888 to 44.76 in 1900 and to 52.83 in 1911 (*H. G. Villard*,

Workmen's Accident Insurance in Germany, pp. 21-22). French experience in 1904-7 shows an increase of from 52.8 to 96.1 accidents per thousand workmen (*Report of Proceedings of U. S. Employers' Liability and Workmen's Compensation Commission of 1912*, p. 1431).

Statistics show an increase under compensation laws in the percentage of accidents attributable to the fault of the workman. In the German Official Estimate of the responsibility for accidents in 1887, 26.56 out of every 100 accidents were allocated to the injured workmen's own fault. This proportion increased to 41.26 out of 100 accidents attributable to the workmen's own fault in 1907. (Figures for 1887, *24th Annual Report, Commissioner of Labor*, p. 1137; for 1907, *92nd Bulletin of Labor*, p. 64).

One of the great dangers of workmen's compensation laws is the increasing amount of malingering. Offering anyone the opportunity to shirk and still obtain wages or the equivalent of wages without work is leading him into almost irresistible temptation. The law provides that "no benefits * * or insurance of the injured employee * * shall be considered in determining the compensation or benefits to be paid under this chapter" (Sec. 30). The workman's income from compensation, accident insurance and benefits paid by labor unions and other benefit societies will not infrequently be greater than his income when working full time. Furthermore, the workmen's compensation is computed upon a basis of 300 working days in the year (Sec. 14). It is matter of common knowledge that in many of the trades industrious workmen average far less than 300 working days per year. It is thus as profitable for many workmen to rely on compensation as to work. Especially is this true of the idler who, though he is injured on the first day on which he ever did a stroke of work in his life, receives under the law compensation based upon what he would

earn in that employment paid at the average rate and working 300 days a year.

Dr. Otto Naegeli, Professor at the University of Tübingen, in his inaugural address delivered February 13, 1913, called attention to the effect of the Swiss compensation law in bringing about an increase of imaginary ills, particularly at times when unemployment was common. (*Naegeli, Concerning the Effect of Legal Rights to Compensation in Cases of Neurosis*, p. 17.)

A casual glance at accident statistics shows a much greater increase in the number of minor disabilities than in the number of fatal or serious accidents, and the constantly increasing length of time required for recovery in cases of minor disabilities also reflects this tendency. German writers have pointed out the grave dangers inherent in a system of workmen's compensation and have deplored the attendant loss of moral fiber. *Ludwig Bernhard, Undesirable Results of German Social Legislation* (1914).

The Industrial Accident Board of Massachusetts in its *First Annual Report* (1914), p. 44, felt it its duty to call to the attention of the Legislature "the conditions which have shown, especially in Europe, a tendency to sap the vital elements of character and check the growth of the qualities of the highest value in national development," the chief of which conditions was malingering.

The same Board also points out as "one of the logical but most unexpected developments of the workmen's compensation act * * * the throwing of aged and infirm employees out of industry * * *." The conclusion is that "the State which has thrown these employees out of work will eventually be asked to make provision for them, although the danger of acts providing for non-employment insurance and superannuated insurance is so obvious that they need not be here discussed" (p. 44.)

SECOND POINT.*

The New York Workmen's Compensation Law denies this Plaintiff-in-Error the equal protection of the laws because, although it complies with the Compensation Law, it is not freed from further liability to workmen injured on shipboard, but remains liable to suits in Admiralty.

Employers other than those of men working on shipboard, upon complying with the law, are given complete immunity from suits to recover for disabilities sustained by their workmen in the course of the employment. After providing in Section 10 that compensation for injuries shall be paid according to the schedules of the law, it is provided in Section 11 that

“the liability prescribed by the last preceding section shall be exclusive, except . . . an employer fail to secure the payment of compensation”

The exclusiveness of the law is a most vital feature. As the Court of Appeals said in this case:

“Exemption from further liability upon paying the required premium into the state fund is an essential element of the scheme.” (p. 21.)

We shall show that the liability prescribed by the law is not exclusive as to this employer, but that it and other employers of men who work on shipboard remain liable to suit in admiralty and are thereby denied the protection accorded to all other classes of employers.

The law in terms applies to workmen engaged in the operation of New York vessels wherever the vessel may

* The discussion of this point by the Court of Appeals is found in its opinion in *Clyde Steamship Company, plaintiff-in-error, v. Walker, defendant-in-error*, argued herewith.

go (Sec. 2, Group 8) and to those engaged in longshore work. The seamen's work is always upon vessels and the longshoremen's work is largely done on shipboard.

When an accident happens on shipboard a claim arises within the admiralty jurisdiction of the Courts of the United States and suit may be brought in admiralty against the ship owner, the vessel, or the employer of the workman. *Atlantic Transport Company v. Imbrovek*, 234 U. S. 52.

Accordingly, a seaman or a longshoreman injured while upon a vessel may have recourse to the District Courts of the United States for the enforcement of his rights. He has a lien upon the vessel through whose fault he was injured and this lien is a property right which does not abate even upon the death of the libellant. *The Transfer No. 12*; 221 Fed. 409.

The right of action given by the maritime law is not subject to modification by the law of the various states. In reposing admiralty jurisdiction in the Courts of the United States Congress has given them the exclusive power to state and enforce the admiralty law and has withdrawn this subject entirely from the power of the states. It is well settled that the jurisdiction of the admiralty courts cannot be increased, diminished or modified by state decisions or enactments.

By Section 2 of Article III of the Constitution of the United States it is provided that

“The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.”

By Section 1 of Article III it is provided that

“The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish.”

By Section 24, Par. 3, of the Judicial Code of the

United States (Act of March 3, 1911; 36 Stat. L. 1091) Congress has conferred upon the District Courts of the United States original jurisdiction "Of all civil cases of admiralty and maritime jurisdiction."

In the case of *The Lottawanna*, 21 Wall. 558, after speaking of the provision of the Constitution conferring admiralty and maritime jurisdiction upon the Courts of the United States, this Court said at page 575:

"The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states. . . ."

The jurisdiction conferred upon the courts of the United States is jurisdiction to hear the controversy and determine it according to the accepted principles and rules of maritime law. It is not jurisdiction merely to apply the local law of the various states as that law may be determined by decisions of the courts or by legislative enactments. This is well shown by the case of *Workman v. New York City*, 179 U. S. 552.

There the owner of a vessel filed a libel against the City of New York to recover the damages caused by the negligence of those in charge of a fireboat belonging to the Fire Department of the City. At law there could have been no recovery because the City was at the time engaged in a governmental function. This Court held that the owner of the vessel had a right of action in admiralty, however, and could recover in the courts of the United States having admiralty jurisdiction the damages which he had sustained. The Court said at page 557:

“The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decisions therein.”

This proposition the Court held was unfounded. At page 558 it said:

“The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent.”

See also *The Max Morris*, 137 U. S. 1; *The Thode Fagclund*, 211 Fed. 685.

It follows that whatever power a State may have to take from the injured workman his common law right of action, it cannot take from him his cause of action in admiralty, *The Fred. E. Sander*, 208 Fed. 724; *The Rosalie*

Mahony, 218 Fed. 695, 698. In the former case it was held that a longshoreman injured on shipboard could maintain an action in admiralty, although the Workmen's Compensation Law of Washington provided for the payment of compensation,

"regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, * * *."

The Court held that the State was without power to take away the workman's right to recover in admiralty.

What then is the result of this law? The employer of men who work on land is protected from suit and from being compelled to make other payments than those required by the law. The employer of men working on shipboard, although he pays the premiums and fully complies with the law, is not protected. The injured employee, if the accident was due to negligence of the vessel or her owners, will sue in admiralty and recover damages. Every one of the workmen hurt on shipboard may resort to the admiralty courts and, although the employer has made the outlay required by the law for his injured employees, they may obtain decrees in admiralty which the employer must satisfy. Such a discrimination between the employers of those working on vessels and employers of those working on land is purely arbitrary and it results in denying to employers of men on shipboard the equal protection of the laws.

It was to avoid this result that the Supreme Court of Washington in the case of *State ex rel. Jarvis v. Daggett* (Supreme Court of Washington), 151 Pac. 648, held that seamen did not come under the Washington Workmen's Compensation Law, although one of the occupations which in terms was subject to the law, and from which premiums were required, was the operation of steamboats. The Court said at page 649:

"If companies operating boats upon Puget Sound

are within the act, then they may be compelled to pay the percentage of their pay rolls specified, and yet be subject to a right of action in admiralty; while other persons or corporations engaged in a hazardous business not covered by admiralty law would be completely protected against the pursuit of any other remedy or proceeding. The owner of a steamboat, if he should pay the percentage of his pay roll specified, and his injured seamen would pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens. If the act were given this construction, it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the constitution of the United States which provides that no state shall make or enforce any law which shall 'deny to any person within its jurisdiction the equal protection of the laws.' "

To avoid an interpretation of the law which would render it void as denying the equal protection of the laws, the Court refused to apply the law to the employer of seamen.

The Ohio Workmen's Compensation Law has also been held inoperative as to seamen in *Schuede v. Zenith S.S. Co.*, 216 Fed. 566; certified to this Court by the Circuit Court of Appeals for the Sixth Circuit, on Jan. 14, 1916.

The Court in *State ex rel. Jarvis v. Daggett* (*supra*) also pointed out that U. S. Rev. Stat., sec. 4283, limits the liability of the vessel owner for damage or injury occurring without his "privity or knowledge" to the value of the vessel after the accident, and her pending freight. This sum may be much less than the compensation fixed by the schedules of the compensation law. The limited liability law applies to cases of personal injury and death. *Butler v. Boston & Savannah S.S. Co.*, 130 U. S. 527. But how may the vessel owner, if he is required in advance to pay premiums against injury to his workmen, have the benefit of this limited liability provided by Congress?

A discrimination similar to that presented in the case at bar was held to invalidate a compensation law in the case of *Cunningham v. Northwestern Imp. Co.*, 44 Montana, 180 (119 Pac. 554). The law there provided that mine owners should contribute to the State one cent per ton of coal mined, and miners should contribute one per cent. of their gross earnings to a fund administered by the State for making compensation to injured miners. The Court held that as the act did not give an exclusive remedy, but left the employer liable to suit, it violated the clause of the Constitution of the United States guaranteeing the equal protection of the laws. At page 221 the Court said:

"The duty to make payments as provided in Section 2 is absolute and unconditional. It can be enforced by appropriate action. But, after full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case. No provision is made for reimbursement in whole or in part. The injured employees of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled to pay twice. He has fully paid his assessments under the act, and is also obliged to pay damages. This fact is so palpable as to be needless of discussion. The act in this regard is not only inequitable and unjust, but clearly illegal and void, as not affording to such employer the equal protection of the laws. . . .

"The manner in which the equal protection of the laws shall be afforded to the operator is, of course, for the legislative body to determine; but some method must assuredly be provided to protect him from double payments. The act in its present form is, in this regard, so repugnant to all ideas of equity and equality that it must, we think, appeal to every right-thinking person, on the most cursory examina-

tion, as unjust. It was to guard against such legislation as this, as we apprehend, that the framers of all American constitutions guaranteed to the citizen the equal protection of laws."

The New York law is subject to the same objections as those rendering the Montana act unconstitutional. Although the employer may fully comply with the terms of the law, he is not exonerated from liability for injuries sustained on shipboard. He does not obtain what the Court of Appeals has characterized as "an essential element of the scheme." He may still be sued and compelled to pay damages. No provision is made for his reimbursement in whole or in part. The injured employees of one steamship company may choose to accept compensation; those of another steamship company may elect to proceed in the admiralty courts. The employer whose workmen work on land, upon compliance with the terms of the act, is free from all liability for disabilities to his workmen. The employer of men whose work takes them on shipboard, although he pays premiums to the State Fund or to the insurance carrier, furnishes medical attention to the injured workmen, and fully complies in all respects with the law, remains liable to suit in admiralty. This discrimination is without any rational basis; indeed, no reason for such a discrimination is suggested. As applied by the Court of Appeals the law denies employers of men working on shipboard the equal protection of the laws guaranteed to all persons.

It has been suggested that employers of men working on shipboard can by self insurance avoid double payments and thereby escape this discrimination. But freedom from double liability is not assured by this employer carrying its own risk. If the employee obtains a decree in admiralty and then presses his claim for compensation, upon what ground can the Commission refuse to make an award?

Furthermore, this employer is entitled to the same rights under the compensation law as any other employer. It must have the right to pay premiums into the State fund and secure the same protection as such payments afford to all other employers. Nothing less is "equal protection of the laws."

As to employers of men working on shipboard, the law is compulsory, but it is in effect optional as to employees working on shipboard. It was a similar consideration that led to the overthrow of the Texas law in *Middleton v. Texas Power & Light Co.* (Texas Court of Civil Appeals), 178 S. W. 956. The Court said at page 957:

"Our reason for holding that the provision of the statute referred to is unconstitutional is based upon the fact that it leaves it optional as to the employer, and makes it compulsory as to the employee when the employer has elected to avail himself of the benefits of the statute. The Federal Constitution declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws . . . Undoubtedly, the statute here involved is optional as to the employer; he has his choice and may or may not become a subscriber, pay premiums, obtain insurance for the benefit of his employees, and thereby release himself from what would otherwise be his liability to such employees. It is true that if he does not pursue that course he loses some of his common law defenses; but the fact remains that he has an option and may choose between two laws concerning himself and his employees and fixing their respective rights.

"We think it is also quite clear that the statute is compulsory as to the employee and allows him no choice as to whether he will accept its terms, or claim his rights as they formerly existed according to the common law. This being the case, we think it is clear that this statute, in so far as it undertakes, without his consent, to deprive an employee of his

common-law right of action at the option of his employer, is violative of the constitutional provisions above referred to."

And at page 959:

"We deem it proper to say that if the terms of this statute were reversed and employees accorded the exclusive privilege of choosing between two laws, our decision would be the same."

The Court suggests that employers of workmen injured on shipboard were, before the compensation law, subject to two remedies—a suit at common law and a suit in admiralty; that the compensation law merely works a substitution of compensation for common law liability and that the admiralty remedy remains as before. Before the compensation law there was but one liability—a liability based upon fault—although there were two remedies, since the workman had his option as to what forum he should use to enforce that liability. Under the present law the employer is subject not only to two remedies, but to two differing liabilities. The workman has the option of choosing not only the forum where he will enforce his rights, but of choosing also the law which he will have enforced. If he is injured through the fault of a stranger, *vis major*, or through his own negligence or misconduct he will elect to take compensation under the compensation law. If he is injured through the fault of the vessel, the shipowner or the stevedore he will bring suit in admiralty, not to obtain mere compensation, but to recover full indemnity for the injuries which he has sustained. Surely such a difference in the position under the law, of employers of men working on land and employers of men working on shipboard, can not be dismissed by saying that there has been a mere substitution of one remedy for another.

The Court of Appeals reasons that this employer is

not denied the equal protection of the laws because the failure of the legislature to make the remedy given in the compensation law exclusive as to workmen injured on shipboard results not from the deliberate intent of the legislature, but from the lack of power of the legislature to grant this exemption.

We have found no case which supports this reasoning of the Court of Appeals. Can a law, operating unequally and unjustly upon different persons, be justified by the assertion that the legislature, which put the statute into operation, could not prevent a discrimination under the statute? Is a statute any less objectionable because the legislature is unable to remedy inequalities brought about by its operation than because it refuses to do so? We find in the authorities no support for such a proposition.

The Constitution does not prohibit the States from denying *as far as they can* the equal protection of the laws. If the State cannot avoid offending against this provision of the Constitution in enacting a certain law, it must refrain from enacting that law. If enacted, the law and not the Constitution must give way.

THIRD POINT.

The New York Workmen's Compensation Law imposes a direct and unconstitutional burden upon the interstate commerce transacted by the plaintiff-in-error.

The workmen's compensation law contains in section 114 a provision dealing with interstate commerce, and the Court of Appeals held that this section literally construed,

"makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce" (p. 18).

The Court of Appeals felt, however, that a broader application of the law was intended, and it applied the law in this case, although both employer and employee were engaged solely in interstate commerce. This construction placed by the Court of Appeals upon the law must, of course, be accepted in this Court.

The business of this employer in this State consists solely of interstate commerce. The number of its employees and the amount of their payroll has a direct relation to the business. It is a rough measure of the amount of interstate business transacted by the Company in this State. The effect of exacting the payment of compensation to its injured employees without regard to any violation of its duties or obligations, but solely in pursuance of the State's views of what will be conducive to the general welfare, is to lay a tax upon the interstate commerce transacted by this employer. It is none the less a tax if it be, as the Court of Appeals said,

"A compulsory scheme of insurance to secure injured workmen in hazardous employments and their

dependents from becoming objects of charity" (p. 21).

The exaction from an interstate carrier of arbitrary sums of money whether in the form of compensation awards to its employees, or of premiums to the State insurance fund, does not differ in principle from the exaction of a fixed amount for each employee. A statute requiring that the carrier pay to the State \$1 per month per employee, however commendable the use to be made of the fund, would hardly be sustained by this Court.

An ordinance of New York City exacting the annual payment of \$5 "for each express wagon" and 50 cents "for each driver" was held unenforceable as to interstate commerce. *Adams Express Co. v. N. Y.*, 232 U. S. 14, 33.

State statutes, the effect of which is to tax interstate business, have been uniformly condemned by this Court regardless of the manner in which the tax was attempted to be laid. This Court has struck down not only statutes laying taxes directly upon articles of commerce or upon the physical instrumentalities of commerce, but also statutes whose effect was to tax and thereby burden interstate commerce in any way.

In the case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336, this Court said:

"Taxing the transportation either by its tonnage or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress."

In *Galveston, Harrisburgh & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, this Court held unconstitutional a tax on the gross receipts of a railroad company which, though its line lay wholly within the State of Texas, was engaged in interstate commerce.

The burden imposed upon the employer here in respect of his employees engaged in interstate commerce is quite as direct a burden upon that business as a tax upon the gross receipts of that business.

Property taxes may, of course, be laid upon the property of those engaged in interstate commerce as well as upon the property of others. Likewise, the State may require the payment of a license tax as a condition precedent to granting a privilege which is within its power to grant or refuse. Beyond this the State cannot go in the imposition of taxes upon those engaged in interstate commerce. Other taxes than these have invariably been held to constitute a direct burden upon interstate commerce, and have been uniformly condemned by this Court regardless of the form in which they have been disguised.

Under the guise of inspection laws the States have often sought to exact contributions from those engaged in interstate commerce, but when the inspection charge was greater than such as to remunerate the State for the service performed, statutes imposing such taxes have been overthrown. For this reason this Court declared unconstitutional a meat inspection law in *Brimmer v. Rebman*, 138 U.S. 78, and a similar law in *Minnesota v. Barber*, 136 U.S. 313; a tax for the inspection of telegraph poles, in *Postal Telegraph Cable Co. v. Taylor*, 192 U.S. 64, and an Oyster Inspection Law in *Foot v. Maryland*, 232 U.S. 494.

Many of the States have felt that peddlers, hawkers and others following similar pursuits were nuisances and that the welfare of the State required that they be licensed, but such statutes when applied to those engaged in interstate commerce have again and again been condemned.

Brennan v. Titusville, 153 U.S. 289;

Welton v. Missouri, 91 U.S. 275;

Caldwell v. N. Carolina, 187 U.S. 622;

Rearick v. Pennsylvania, 203 U. S. 507;

Dozier v. Alabama, 218 U. S. 124;

Crenshaw v. Arkansas, 227 U. S. 389.

The States are prohibited not only from taxing interstate commerce, but also from imposing any direct burden upon such commerce. As was said in *The Minnesota Rate Cases*, 230 U. S. 352, 396:

“If a State enactment imposes a *direct burden* upon interstate commerce it must fall regardless of Federal legislation.”

In *Heyman v. Hays*, 236 U. S. 178, 186, the Court said:

“The protection against the imposition of direct burdens upon the right to do inter-state commerce, as often pointed out by this Court, is not a mere abstraction affording no real protection, but is practical and substantial and embraces those acts which are necessary to the complete enjoyment of the right protected.”

Obviously it is essential for those engaging in the carriage of merchandise and passengers from other states to hire workmen and to pay wages, and the exercise of this right is necessary to the complete enjoyment of the right to engage in interstate commerce. Yet when the employer uses workmen in the movement of interstate freight the compensation law exacts from the employer engaging in interstate commerce certain sums to be used for the support of injured workmen and their dependents. Such a requirement seems a much more direct burden than many which the states have attempted to impose, but which this Court has unhesitatingly condemned.

We shall look, then, to some of the decisions and endeavor to trace the line of distinction between direct burdens which may not be placed by the States upon interstate

commerce and those incidental regulations which lie within the sphere of the States until Congress speaks.

State statutes passed to encourage carriers to pay their just obligations do not directly burden interstate commerce, and (before federal legislation upon the subject) this Court accordingly upheld a statute of South Carolina which required a carrier to settle within a specified time claims for freight lost while in the carrier's possession. *Atlantic Coast Line R.R. Co. v. Mazursky*, 216 U. S. 122. A State statute cannot place upon a carrier, however, an obligation to trace interstate shipments and to inform the shipper where and under what circumstances the freight was lost, and a statute of Georgia attempting to impose such an obligation was declared unconstitutional in the case of *Central of Georgia Railway Company. v. Murphey*, 196 U. S. 194. At page 203 it is said :

"This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce."

States may impose upon interstate carriers the duty of furnishing reasonable accommodations for local needs, but they cannot go further and require interstate carriers to furnish facilities after local requirements have been met. *Chicago, Burlington & Quincy R.R. Co. v. Railroad Commissioners of Wisconsin*, 237 U. S. 220. It is beyond the power of the State to require a railway company to deliver interstate cars to a consignee on a private siding beyond its right of way, for such a law imposes "a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce." *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 561. Nor can the State impose upon a railroad company a requirement absolute except in case of strike or other

public calamity to furnish cars on a specified day for interstate transportation, for the imposition of such an absolute obligation with the resulting penalties from a failure which might occur from circumstances wholly beyond the control of the carrier imposes a direct burden upon interstate commerce. *Houston & Texas Central R.R. Co. v. Mayes*, 201 U. S. 321. Likewise, the attempted imposition of an absolute obligation upon a railway company to place cars for consignees within 24 hours after arrival was held to impose a direct burden and to be unconstitutional as to interstate shipments. *Yazoo & Mississippi Valley R.R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1.

A Louisiana statute giving the master and wardens of a port the exclusive right to survey hatches of vessels and to hold surveys of the goods, the purpose of the statute being the laudable one of preserving an official record of the condition of cargo, was held to constitute a direct burden. *Foster v. Master and Wardens*, 94 U. S. 246.

We have argued that the taking of property wrought by the compensation law cannot be justified as an exercise of the police power. Even were the law a valid exercise of the police power, it would still be unconstitutional if our contention that it lays a direct burden upon interstate commerce is correct.

When certain ordinances of New York City dealing with expressmen were applied to those engaged in interstate commerce and were sought to be sustained upon the ground that the ordinances were adopted in the exercise of the police power, this Court said in *Adams Express Co. v. N. Y.*, 232 U. S., 14, 31:

"It is insisted that, under the authority of the state, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce."

The Court of Appeals reasons that the Workmen's Compensation Law does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relation between employer and employees in this State. The regulation of a relation, however, may impose a direct burden upon commerce. It might have been said in the case of *International Text Book Co. v. Pigg*, 217 U. S. 91, that the statute which was held unconstitutional there did not purport directly to regulate interstate commerce, but was merely passed for the purpose of regulating the relations between foreign corporations and those doing business with them and who might want to sue them in the State of South Dakota. In the case of *Hall v. De Cuir*, 95 U. S. 485, it might have been urged that the statute of Louisiana did not purport directly to regulate interstate commerce, but merely regulated the relation between carrier and passengers, white and black; but the Court held that statute unconstitutional as applied to interstate commerce.

The Court of Appeals referred to certain cases involving State regulations which so incidentally affected interstate commerce that the State action was upheld. It is, of course, conceded that the State may impose upon all, including those doing interstate business, the duty of taking precautions for the safety of their workmen and may impose obligations upon the employer for breach of such a duty. The State may sanction by statute the moral duty of its citizens to refrain from wrongfully causing the death of other persons and may allow the recovery of damages for breach of that obligation, and such duties may be imposed upon those engaging in interstate commerce as well as those engaging in other business. *Sherlock v. Alling*, 93 U. S. 99. In the interest of the public health, the State, which has always had supervision over

matters of local health, may require vessels coming into its ports to submit to an examination and may require the vessel owner to pay for the service received. *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455. Likewise, a State may require that diseased cattle may not be brought into the State, and for the purpose of carrying out that policy may require the inspection of cattle, the expense of such inspection to be paid by those seeking to bring in the cattle. *Reid v. Colorado*, 187 U. S. 137.

Another case referred to by the Court of Appeals, *Erie R.R. Co. v. Williams*, 233 U. S. 685, upholding the New York Two Weeks' Pay law, involved only a trivial interference with the employer's business, and if it imposed any burden upon interstate commerce the burden was most indirect and negligible.

These cases upon which the Court of Appeals relied are far from meeting the situation at bar. The State may properly impose reasonable rules of conduct, applying to those engaging in interstate commerce, as well as to others, without conflicting with the commerce clause of the Constitution of the United States. When the State goes further, however, and enacts legislation which constitutes a tax and a direct burden upon interstate commerce, such legislation cannot stand.

FOURTH POINT.

Congress by the Federal Employers' Liability Act of 1908 has dealt with and assumed exclusive jurisdiction over the field of compensation payable for injuries received by the employee of a common carrier by railroad while both employer and employee are engaged in Interstate Commerce.

The Court of Appeals recognized that if the compensation law occupies a field which Congress has entered, the state law can not govern; indeed, it pointed out that the legislature in section 114 of the law had in effect said that

"it did not intend to enter any field from which it had been or should be excluded by the action of the congress of the United States" (p.19).

The only question, then, is whether Congress has entered the field occupied by the state law.

By the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65) Congress has provided that

"Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The law by its terms applies to "every common carrier by railroad," upon two conditions. Those conditions are that at the time of the accident the employer be engaging in interstate commerce, and that the employee also be engaging in interstate commerce. The facts found by the Commission show that all of these conditions were present. The Commission found that the employer was a common carrier by railroad; that the employer was engaging in interstate commerce at the time the accident happened, and that the employee was at the same time likewise engaging in interstate commerce.

The Court of Appeals was of opinion that it was essential to the application of the Federal Act that the accident should occur in the operation of a railroad. The statute does not so provide. It contemplates that the railroad company shall have other branches of its service than rail lines. It specifically provides that the carrier shall be liable when the employee is injured by defects or insufficiencies "in boats, wharves, or other equipment." Congress thus intended to include under the Federal Employers' Liability Act employees of railroad companies injured while engaged in interstate commerce even though their work was upon a boat, as in the present case.

The Federal Employers' Liability Act has been uniformly applied in the lower Federal Courts to injuries received on vessels so long as the employer was a common carrier by railroad. *The Passaic*, 190 Fed. 644; *Erie R.R. Co. v. Jacobus*, 221 Fed. 335. Where the vessel is "not a part of a railroad or railroad system, nor a common carrier," the Act, of course, does not apply. *The Pawnee*, 205 Fed. 333.

In *The Passaic*, an employee of the Erie Railroad Company was killed by the escape of steam into the fireroom of the ferryboat *Passaic*, which plied between New York and New Jersey. Upon suit being brought the Company

took proceedings in admiralty to limit its liability. The Court held the Federal Employers' Liability Act the proper law to apply in determining whether the employee had a cause of action against the Railroad Company, saying at page 649:

"It may be assumed that the transportation of freight and passengers by the railroad company from Jersey City across the Hudson River into New York State is interstate commerce. The employees upon the ferry boat were employees of the railroad company, therefore, engaged in an occupation within the interstate commerce jurisdiction of the Congress and the United States courts (*Pedersen v. D. L. & W. Railroad* (C. C.) 184 Fed. 737), and the law of 1908 is applicable thereto. It is expressly limited to the activities of a carrier by railroad. The maintenance of a ferry may be within the charter powers of a railroad company, and it cannot be said that the voyage is a carriage by rail. But the statute does not limit the liability of the carrier to its track or train service. It expressly refers to defects or negligence in boats, wharves, and other equipment, provided they and the injured party are engaged in interstate commerce."

This decision was affirmed on appeal (204 Fed. 266), the Circuit Court of Appeals for the Second Circuit saying that it fully concurred with the decision of the District Court except upon a point of jurisdiction, not material to the question considered here.

The Circuit Court of Appeals for the Third Circuit in the *Jacobus* case (*supra*) held that an employee injured on board a tugboat of the Erie Railroad Company could maintain an action under the Federal Act. In that case the Court said at page 338:

"If the expression 'common carriers by railroad,' as used in the title of the act, is open to debate, the clear expression of the act itself with respect to carriers' liabilities in connection with the instrumental-

ities of railroad operation, including by enumeration boats and wharves, discloses that the scope of the act was intended to include the liability of carriers for their negligence, or that of their employes, occurring upon or in connection with those instrumentalities while engaged in interstate commerce."

The Act has been given a wide application under the decisions of this Court. It has been applied even in cases where the employee was not participating in an interstate operation, but was merely taking steps looking to the repair of instrumentalities used in both interstate and intrastate commerce. *Pedersen v. D. L. & W. R.R. Co.*, 229 U. S., 146.

Since the decision of the case at bar by the Court of Appeals that Court has held in the case of *Winfield v. New York Central R.R. Co.*, 216 N. Y., 284, that the Federal Employers' Liability Act occupied the field only of injuries occasioned by negligence; that there is no conflict between the Federal act and the workmen's compensation law, at least so long as the state legislation is applied to accidents occurring in interstate commerce only when not occasioned by negligence. Whether the employer may show the facts necessary to bring the case within the Federal Employers' Liability Act, as construed by the Court of Appeals, the Court did not determine saying at page 296:

"If a claim is made under the state statute against an employer and the employer pleads that the employee was injured in interstate commerce as a result of the employer's negligence the question will be presented whether the employer shall be permitted to urge his negligence to defeat the claim of his employee. That question is not now presented and we think discussion of it should be reserved until it arises."

The result of this decision is that in administering a law purporting to require compensation to be made irrespective of fault the Commission, preliminary to determining whether it has jurisdiction of a claim, must make an inquiry into the question of fault, the very matter which it was the intention of the law to eliminate. Before deciding whether it may entertain the claim for compensation, the Commission must determine the merits of the controversy under the Federal Employers' Liability Act. Accepting the Court of Appeals' construction of the law, we look to the decisions of this Court and the principles there laid down to see whether or not the law conflicts with federal legislation enacted pursuant to the Commerce Clause.

The decisions of this Court show that in enacting the Federal Employers' Liability Act Congress assumed exclusive jurisdiction of the whole field of the indemnification of employees of railroad companies injured while both master and servant are engaged in interstate commerce.

The action of Congress in providing under what circumstances the railroad company shall be liable is tantamount to enacting expressly that the railroad company shall not be liable to its employees under other circumstances. The field occupied by Congress in passing the Federal Employers' Liability Act was not simply the field of liability (that is, *recovery* by the employee, in the specific case), but was the field of the carrier's whole responsibility in respect of injuries and death received in the employment.

In *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 571, 576, the Court said of the Employers' Liability Act that

"With respect to the *responsibility* of interstate carriers by railroad to their employees injured in such commerce after its enactment it had the effect

of superseding state laws upon the subject." (Italics ours.)

In the case of *St. Louis & Iron Mountain Ry. Co. v. McWhirter*, 229 U. S. 265, 275, the Court instances as a Federal question which it can review:

"the right of the defendant to be *shielded from responsibility under that statute* [Federal Employers Liability Act] because when properly applied no liability on his part from the statute would result." (Italics ours.)

In the case of *Toledo, St. Louis & Western R.R. Co. v. Slavin*, 236 U. S. 454, 457, the Court said:

"When the plaintiff brought suit on the state statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was engaged in interstate business."

The case of *Seaboard Air Line Railway v. Horton*, 233 U. S., 492, leaves no room for doubt on this point. In that case an engineer engaged in interstate commerce was injured by the bursting of a water gauge. The Federal Employers' Liability Act makes the railroad company liable for injuries resulting from a defect in the company's engines or appliances when "due to its negligence." The North Carolina statute, in terms at least, makes railroad companies liable for injuries suffered "by any defect in the machinery, ways or appliances of the company." The Trial Judge expressed the notion that the duty of the defendant was absolute with respect to the safety of the place of work and of the appliances for the work. Of this the Court said at p. 501:

"In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is set-

fled that since Congress, by the Act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded. *2nd Employers Liability Cases*, 223 U. S., 1, 55."

After the Court said:

"It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carriers to its employees for defects and insufficiencies not attributable to negligence."

Had the Federal Act not occupied the whole field of liability for injuries in interstate commerce, whether through negligence or not, the lower court's instructions could have been correct. If the state statute had not been superseded, then if there was no negligence and so no liability for the defect under the Federal Act, the court could properly have applied the state statute imposing the absolute duty to furnish a safe appliance. But in the view of this Court, the Federal Act had taken possession of the whole field of liability of employer to employee for injuries occurring in interstate commerce.

Congress has not only enacted under what circumstances a railroad company shall be liable, but it has also provided what damages may be recovered, *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59; the persons entitled to damages, *Gulf, Colorado & Santa Fe Ry. Co. v. McAnnis*, 228 U. S. 173; *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, 229 U. S. 156, and the manner in which the damages are to be distributed. *Taylor v. Taylor*, 232 U. S. 3. No action for death to an employee engaged in interstate commerce can be brought against the railroad company except within the time provided by Congress. *Atlantic Coast Line R.R. Co. v. Burnett*, 239 U. S. 199. The fact that there is no liability imposed by Congress in favor of certain relatives of a deceased workman or that Congress has made no provision for the recovery of other

than pecuniary damage in death cases, does not leave the field of legislation in these respects open to the states, for "the act of Congress creates the only obligation that has existed since its enactment." *Atlantic Coast Line R.R. Co. v. Burnett*, 239 U. S. 199, 201.

It seems to have been the view of the Court of Appeals that the state law is inoperative only in so far as it conflicts in a given case with affirmative declarations of Congress. The Hours of Service Act Cases, *Erie Railroad Co. v. New York*, 233 U. S. 671 and *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, show this view to be unsound and that Congress by refraining from acting may as effectually withdraw a field from state legislation as though it had enacted affirmative measures. Thus, in the former case when Congress had provided that telegraph operators should not be permitted to work more than 9 hours in a day a state law which purported to prescribe an 8 hour day was held invalid. This Court viewed the action of Congress in prescribing a 9 hour day as an expression by Congress of its judgment as to the proper extent of such restrictions. The Federal law involved there had not gone into effect at the time of the occurrences out of which that case arose, but this Court held that the State law could not operate in the time between the passage of the Act and the time when it went into effect, because the action of Congress in postponing the operation of the law was tantamount to providing that in the meantime the subject should be free from state interference.

In *Southern Ry. Co. v. R.R. Comm. of Indiana*, 236 U. S. 439, 448, where an Indiana statute relating to grab irons on railroad cars was declared unconstitutional, this Court said :

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any

jurisdiction of a subject over which Congress had exerted its exclusive control."

Directly contrary to the decision of the Court of Appeals in the *Winfield* case are *Smith v. Industrial Accident Commission*, 26 Cal. App. 560 (147 Pac. 600) and *Staley v. Illinois Central R.R. Co.*, 268 Ill. 356 (109 N. E. 342). The *Winfield* case was followed in New Jersey in *Winfield v. Erie R.R. Co.* (not yet reported) now in this court on writ of error.

We submit that the injury in the case at bar falls within the Federal Employers' Liability Act; that recourse must be had to that Act alone to determine the obligation of this plaintiff-in-error, and that the Workmen's Compensation Law can not apply irrespective of the presence or absence of negligence on the part of the employer.

LAST POINT.

The judgment should be reversed with costs.

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United States Supreme Court, U. S.

FILED

FEB 21 1916

JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States

SOUTHERN PACIFIC COMPANY,

Plaintiff in error,

against

October Term,
1915.

No. 700 280

MARIE JENSEN et al.

In error to the Supreme Court, Appellate Division, Third Judicial
Department of the State of New York

Brief of the New York State Industrial Commission

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Supreme Court of the United States.

SOUTHERN PACIFIC COMPANY,
Employer and Self Insurer,
Plaintiff in Error,
against

MARIE JENSEN, HAROLD JENSEN
and EVELYN JENSEN.

October Term,
1915.
No. 700.

IN ERROR TO THE SUPREME COURT,
APPELLATE DIVISION, THIRD JUDICIAL
DEPARTMENT, OF THE STATE OF NEW
YORK.

Brief of the New York State Industrial
Commission.

STATEMENT OF THE CASE

This is a writ of error to review a judgment of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division of the Supreme Court, which in turn affirmed an award of the Workmen's Compensation Commission of New York which awarded compensation to the widow and children of a deceased workman. The deceased workman, Christen Jensen, was engaged in unloading a steamship, El Oriente, owned by plaintiff, which plied between New York and Galveston, Texas.

The defendant, the Southern Pacific Company, is a common carrier by railroad, but the evidence does not show where its railroads are. It is a corporation of the State of Kentucky, where it has its principal office. It also owns a line of steamships and describes its business in its report in this case to the State Compensation Commission as "*transportation by steamships engaged solely in interstate commerce*" (p. 4). It also carries its own insurance, having been granted permission by the Commission so to do (p. 5).

On August 15, 1914, Christen Jensen, the deceased, was operating a small electric freight truck and was unloading lumber from the steamship *El Oriente*. The ship was about ten feet distant from the pier. The deceased started out of the ship with his truck loaded with lumber. The truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken and in this manner he met his death (pp. 8, 9).

The main question raised upon this writ of error is that the Workmen's Compensation Law of New York and the amendment to the State Constitution, under which it passed, offends against the provisions of the Constitution of the United States. It will, therefore, be necessary to consider the purpose and object of the legislation in question in a broad way.

LEGISLATION

In 1910 the Legislature of the State of New York passed an act to amend the Labor Law, being chapter 674 of the Laws of 1910, entitled "An act to amend the labor law in relation to workmen's compensation in certain dangerous employments." Seven classes of employments were scheduled as dangerous or hazardous employments. By this law a right of action was given for damage or injury caused in whole or in part by a necessary risk or danger of the employment or one inherent in the nature thereof. The employee was given right to compensation of fifty per cent. of his average weekly earnings. Under this law an action was commenced by Earl Ives against the South Buffalo Railway Company. Judgment was entered for the plaintiff and appeal taken to the Court of Appeals, which reversed the judgment, holding the law to be unconstitutional under the State Constitution. This case is reported in 201 N. Y. 271. The court held that the fundamental law might be changed by the people but not by the Legislature. Thereupon an amendment to the State Constitution was passed at two successive sessions of the Legislature and submitted to the people of the State of New York, which amendment added another section to article I of the State Constitution, as follows:

"Section 19. Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of

compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

This was submitted to the vote of the people on November 4, 1913, and the vote for it was 510,914 against 194,494.

Upon the adoption of this constitutional amendment, the Workmen's Compensation Law of the State of New York was passed by the Legislature of said State and is known as chapter 816 of the Laws of 1913 as re-enacted and amended by chapter 41 of the Laws of 1914. This act provides for forty-two groups of hazardous employments, and provides for the liability of employers in sections 10 and 11 as follows:

"Section 10. *Liability for compensation.*—
Every employer subject to the provisions of

this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter."

"Section 11. *Alternative remedy.*—The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

Section 50, providing for security for the payment of compensation, is as follows:

"An employer shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the state fund, or

"2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance.

"3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter.

"If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission.

"The commission may, in its discretion, for good cause shown, remit any such penalty, provided the employer in default secure compensation as provided in this section."

Section 53, releasing the employer from all liability in complying with the act, is as follows:

“An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.”

Provision is made for a Workmen's Compensation Commission, which was afterwards changed to State Industrial Commission, to pass upon the claims submitted to it upon notice to the parties interested. Under section 23 of the act provision is made for an appeal from awards made by the Commission, to the Appellate Division of the Supreme Court, Third Judicial Department, and appeals may also be taken from that court to the Court of Appeals. This section also provides that the Commission shall be deemed a party to every such appeal, and the Attorney General shall represent the Commission thereon. Under this provision the Attorney General has represented the Commission upon the appeals in this case, and also represents the Commission upon the writ of error now to be argued in this court. The law went into effect July 1, 1914, and since that time 248,483 claims have been presented to the Commission. These were not all claims where they were entitled to compensation as many were disabled less than two weeks. The total number of

awards to date is 64,919, of which 1,764 were fatal cases. The department, counting every day except Sunday and Saturday afternoon, has received reports of two cases per minute and a compensation case every two minutes and forty-five seconds. One million eight hundred thousand workmen are covered by the act and 180,000 employers of the State have complied with the law by insuring themselves for the benefit of their employees.

The fact that there were only 64,919 compensation cases out of 248,843 accidents is an answer to the charge made in the brief of the counsel for plaintiff in error that there may be malingering. Not 20 per cent of the industrial accidents reported in New York ripen into claims for compensation. There is very little incentive to a workman to have an accident without cause, provided he can secure no pay for the first two weeks of his disability.

The criticism of the law made by the counsel for plaintiff in error that, in case of a fatal accident where the widow who is left is young, the compensation may amount to a considerable sum, does not take into account the question of averages. There may be more old widows who become entitled to compensation than those who are young, and there is also the chance of death of the widow soon after the accident, so that in many cases the compensation to be paid will be a small, rather than a large sum. Then, there are, of course, many accidents in which there is no widow to be compensated, and the amounts payable to dependents under the law are a small percentage. It is true that if a Workmen's Compensation Law was established for all the states in

this country, that a very considerable sum of money will have to be expended for compensation. But it is also true that at present there is a very large amount spent for insurance against liability for accidents, and a very large amount paid to lawyers for protecting the insurance companies and other corporations from liability.

Counsel for plaintiff in error cites certain statistics from European countries which show an increase in industrial accidents and occupational diseases. It may be observed that if the social laws of Germany are responsible for her industrial efficiency, there is some merit in them. With the growth of industry and of population there may be some increase in the number of reported accidents. Persons gainfully employed in Germany in 1895 were 22,913,683; in 1907, 30,232,345. (Report of U. S. Commissioner of Labor, 1909, p. 979.)

But the statistics are not all the same way. In Legge and Goadby on Lead Poisoning, p. 56, is a table showing that the cases of lead poisoning reported in earthenware and china works in Great Britain averaged 160 per year from 1899-1902 and 89 per year from 1907 to 1910, an attack rate of 25 per thousand in 1899-1902 and 13 per thousand in 1907-1910.

In Ramhousek on Industrial Poisoning, p. 222, the total number of lead poisoning cases reported in 1900 was 1,058, and in 1912 was 587.

See also Thompson on Occupational Diseases.

"In Austria the net cost of accidents from 1897 to 1906 increased only from 1.90 per cent. of the wages to 2.06 per cent. of the wages." (Report

of Commissioner of Labor, 1909, p. 142.) It must be remembered with reference to Germany, Austria and other European countries that they have besides accident insurance, insurance for sickness, old age and unemployment.

Messrs. Frankel and Dawson, whom the counsel for the plaintiff in error quotes, at page 124 of their book say with reference to accidents in Austria:

"The greatest increase has been in accidents effecting injuries of a temporary character, and therefore, except for temporary benefits, from sick insurance not open to compensation under the law. Fatalities remain nearly stationary and although accidents resulting from incapacity have increased since 1890, the increase is much less marked from accidents not open to compensation. Comparing the above figures with those of Germany we find very much the same condition in both countries. * * * The most striking difference is in the relative number of compensated accidents in the two countries. Comparing the figures given by the two governments in 1906, we obtain 66.7 compensated accidents for 10,000 insured in Germany, and 182.2 for 10,000 full time workers in Austria."

In Germany, table 16 on page 116 shows that while those temporarily or partially disabled have increased, the total permanently disabled fell from 2,203 in 1881 to 1,341 in 1907.

Counsel for the plaintiff in error also quotes H. G. Villard that reported accidents in Germany have increased from 28.04 per 10,000 workmen in 1888 to 44.76 in 1900, and to 58.93 in 1911, but as Mr. Villard points out,

"When we turn to the results under the accident insurance, an entirely different set of figures confronts us."

This variance is due to the fact that under the German law all accidents entailing a disability of thirteen weeks or less are treated almost exclusively by sickness insurance societies or by the local authorities. The result is that while the accidents per thousand full time workers were 8.07 in 1897, they were only 8.14 in 1911, and the accidents per thousand insured in 1897 were 6.91 and in 1911, 7.15, and he says:

"An examination of the above table reveals the fact that the number of first time accidents reached their maximum in 1907. Serious accidents are somewhat less numerous, therefore, than formerly."

The question as to whether or not the law is constitutional has been raised by the railroads and steamship companies, which have been allowed to become self insurers.

THE HUMANITARIAN APPEAL

It is only necessary to call attention to the great number of accidents now happening, a matter, not of hourly but momentary occurrence, to show the difference between the new and the old order of things. In the old stagecoach days a driver might in very rare intervals receive a kick from a horse, or there might be a runaway, or the coach tip over in the mud, but accidents were comparatively rare. There was less machinery and more hand and horse work. There was a leisurely pace which it was easy to keep. Statistics now tell us

accurately how many are killed or wounded and when they are gathered together they do not compare unfavorably with the casualties of war. Take the business of transportation. The number of railroad employees seriously injured in one year is over 100,000 — for the year 1910, 103,256. That includes all severe accidents, the loss of a leg, an arm, an eye, or total disability. Minor accidents are not counted. About four thousand railroad employees are each year killed — for the year 1910, 3,738. Every two hours and fifteen minutes one railroad employee is killed and every six minutes one is injured. For this number of killed and injured workmen what remedy does our boasted civilization provide? For every employee whose usefulness as a wage earner is destroyed there is a family to support, there are doctors' and undertakers' bills to pay and there are children to educate.

The remedy which society provides is a right of action in the courts, hedged about as it has been by the doctrine of assumption of risk, contributory negligence and that of a fellow servant. The doctrine of assumption of risk was based upon the economic theory that the workman was deemed to contract freely to accept such risks and that in hazardous occupations wages are higher in proportion to hazard. That is no longer true. Working people in the mass are not economically free to accept or reject hazardous employments and wages are not at all proportional to risks. Workmen have to accept the employment near at hand, whether hazardous or not, and once in the gigantic treadmill of modern industry they must remain in.

The whole doctrine of negligence with its corollaries as applied to modern industry is based upon fiction. Negligence is supposed to mean a moral fault or violation of plain duty for which the master should respond in damage. The masters, in the case of the railroads and steamship lines, are the stockholders, and their directors who manage the affairs of the company. In not one case in thousands could it be said that these masters are morally to blame, and the negligence or fault which is imputed to them by the fiction of the law has not been sufficiently defined to result in anything like a uniform and certain rule of justice. In practice the result more closely resembles a gamble as is evidenced by thousands of reported and unreported cases which have turned upon the meaning of the term negligence as applied to a specific set of facts. It has been defined to mean, not only an avoidable fault, but also lack of ability, lack of judgment, want of skill, ignorance, mere inadvertence and that kind or degree of negligence which humanly speaking is at times inevitable, even with the most careful men.

In the highly organized and hazardous industries the causes of accident generally are so complex and often so remote that as to a material proportion of the accidents, it is impossible by any methods or means correctly to ascertain the facts necessary to form a correct judgment of the particular causes; that as to a yet larger proportion it is practically impossible to do so without such expense and delays as will defeat justice.

Now, what are the results of this system. The following was given at the National Conference of Charities and Corrections in 1910 by S. C.

Kingsley, Superintendent of the United Charities of Chicago as the result of the investigation of fifty fatal accidents:

" Compensation: One case, \$3,000; 1 case, \$1,150; 1 case, \$800; 1 case, \$750; 2 cases, \$500; 1 case, \$400; 1 case, \$300; 1 case, \$270; 2 cases, \$200; 1 case, \$125; 3 cases, \$100; 1 case, \$85; 1 case, \$69; 1 case, \$35; 1 case, \$25; 2 cases, \$20; 15 cases, no benefits; 2 cases, funeral only; 12 cases, suits pending. Families received \$8,749 in 50 ordinary accidents, or an average of only \$187 apiece, while the average earnings had been \$668.47."

The Wainwright Commission reports that "in 115 cases of married men killed by accidents of employment in Erie county, the total compensation paid to the dependents by employers (with or without suit) was as follows:

	Cases	
" 0 in	38	81 out of 103, or 78.6 per cent. of closed cases.
\$100 or less in	9	
\$101 to \$500 in	34	
\$501 to \$2,000 in	14	
Over \$2,000 in	8	
Suit pending in	11	
Total number of cases.	114	

" The average earnings of these men was \$15.22 per week or \$791.44 per year. And yet only eight of the 114 families considered have recovered as much as three times the average yearly earnings (\$2,374.22). Eleven have suits pending against the employer. Eighty-one or 78.6 per cent. of the families whose cases are concluded got no substantial recovery — compensation in these cases ranging from 0 to \$500."

It also appears that an investigation conducted under direction of Pittsburgh Survey showed that

“ Out of 355 cases of men killed in a year's industrial accidents all of whom were contributing to the support of others and two-thirds of whom were married, 89 of the families left received not one dollar of compensation from the employer, 113 families received not more than \$100, 61 families received something over this \$100, but not more than \$500. In other words, 57 per cent. of these families were left by the employers to bear the entire income loss, and, granting that all the unknown amounts would be large and that all the suits pending would be decided for the plaintiff, only 26 per cent. received in compensation for the death of a regular income provider, more than \$500—a sum which would approximate one year's income of the lowest paid of the workers killed.”

The Wainwright Commission investigation also showed that “ among 186 families of married men killed by accidents of employment, which were investigated for the Commission, 93 of the widows had gone to work to support their families; in 9 families children under 16 had gone to work; in 37 families the rent was reduced; 10 families were found destitute; 33 families had received aid from fellow workmen of the deceased, from relatives and friends, or from charity.”

The Industrial Board of Illinois reports that from recent public investigation it was found that the average compensation paid out of court for the death of a skilled railway employee was \$1,457. Cases settled in court had an average award of \$2,078.

The average settlement out of court for the death of a railway laborer amounted to \$936.

The few cases that were settled in court were probably not representative. Their average was extremely low, \$245.

The average death settlement out of court in skilled building trades was \$932. The only successful court settlement was \$200. Almost 50 per cent. of the building trades cases recovered nothing.

The average settlement out of court for the death of a miner was \$294, and ten successful court cases were found to have averaged \$1,021. But more than 60 per cent. of the cases had no settlement, either in or out of court.

In nineteen teamsters' cases that were investigated, not a single one showed a settlement of any sort. The families of steel workers recovered out of court settlements an average compensation of \$1,254 and said board speak of the practical results of Employers' Liability Insurance, as follows:

"Under it every case is a gamble. A shrewd attorney and a sympathetic jury mean a big verdict, and an equally good case, poorly handled, often results in none. But the employer is compelled to prepare each case as if a big verdict were imminent, and he is forced to put up a hard legal fight on that account."

The old system might very properly be styled a "Lawyers and Insurance Compensation Law" as opposed to the new system of the Workmen's Compensation Law. The Wainwright Commission collected statistics from nine insurance companies, which kept separately employers' liability records for the years 1906, 1907 and 1908, in which

it was shown that the premiums received amount to \$23,523,585 and the payments made to \$8,559,795, or on an average 36.34 per cent. of what the employers pay in premiums for liability insurance is paid in the settlement of claims and suits. In other words, for every \$100 paid out by employers for protection against liability to their injured workmen, less than \$37 is paid to those workmen. Sixty-three dollars goes to pay the salaries of lawyers and claim agents, whose business it is to defeat the claims, to the costs of soliciting business and the cost of administration and profit.

The Wainwright Commission, therefore summed up the objections of the present system as follows:

“ Our present system leaves the injured workman to stand the greater part of the industrial accident loss, and because his income is not equal to it, he and his dependents undergo extreme poverty and often become a burden upon public or private charity; on the other hand, because of the uncertain and arbitrary chances of recovery under our system, the State is put to the cost of much fruitless litigation and employers pay out enormous sums to protect themselves against liability on account of industrial accidents, from all of which the victims of those accidents reap little benefit; finally the system is slow in operation, is an encouragement to corrupt practices on both sides, and is a great source of antagonism between employers and employees.”

THE GROWTH OF PUBLIC OPINION

There has grown up as above indicated, as a development or evolution of the law of negligence, the insurance by employers against liability. This instead of decreasing, increases litigation as the insurance companies are interested in defeating or reducing to the utmost limit the amounts which they may be called upon to pay. As a part of evolutionary process there has also been developed a class of lawyers known as "ambulance chasers" who are present to solicit a cause of action even before the funeral, and on the other hand insurance companies have their solicitors and claim agents to appear equally early or earlier to get a settlement at a small sum if possible. The net result of this is that while the employers pay their premiums for insurance, the employees get nothing except through a law suit, and then only a small percentage. Contrast that with the Compensation Law as it has been in force in the State of New York. The employees have in the great majority of cases employed no lawyer, and if the compensation which has been awarded is appealed, the case is argued by the Attorney General of the State before the courts. The premiums therefore which are paid by the employer have a direct result in insuring the employee for the full amount which the law allows. These amounts are not lump sums which can be spent by the employee at once, but are in the nature of support, being paid from week to week during the disability of the employee or the widowhood of the widow. This in turn inevitably

tends to take away one cause of friction between the employers and employees.

Prior to the year 1884 no country provided for compensation for injuries and deaths due to work accidents except by actions for negligence. In 1884 Germany, under the influence of Bismarck, and in deference to socialistic ideas in that country, passed the first act for compensation to workmen. Since 1884 the leading countries of Europe have wholly abandoned the negligence principle in dealing with the disability or death of an employee due to accident. The order of the adoption of these changes is as follows:

Germany, 1884; Austria, 1887; Norway, 1894; Finland, 1895; Great Britain, 1897; Denmark, Italy and France, 1898; Spain, 1900; Netherlands and Greece and Sweden, 1901; Luxemburg, 1902; Russia and Belgium, 1903, and Hungary, 1907.

All of the European countries, with the exception of Turkey, now have laws providing for compensation for injuries and death due to work accidents. Such laws have also been adopted in Australia, 1900-1911; New Zealand, 1908; Transvaal, 1907; Cape of Good Hope, 1905; provinces of Canada, 1897-1909; Mexico, 1906; Venezuela, 1906; Peru, 1911; commencing in 1911, 31 States of the Union.

Most of these states have passed what is known as the coercive and elective plan. Arizona, Maryland, California, Ohio, Washington, Oklahoma, Wyoming and New York are the only states which have enacted compulsory Workmen's Compensation Laws. The compulsory law in Washington has been held constitutional by its Supreme Court in the case of *State ex rel. Davis-Smith Co. v. Clausen*, 117 Pac. Rep. 111.

If this court in deciding the case of *Northern Pacific Ry. Co. v. Meese*, 239 U. S. 614, followed the decision of the Supreme Court of the State of Washington in *Peet v. Mills*, 76 Wash. 437, it must in effect affirm the constitutionality of the Washington Workmen's Compensation Law. In *Peet v. Mills*, the plaintiff sued the president of the Seattle, Renton and Southern Railway Company for which he was working, on the ground of negligence. The defendant demurred on the ground that the Workmen's Compensation Law provided an exclusive remedy and this contention was upheld by the Supreme Court of Washington.

The California act has been declared constitutional. *Western Indemnity Co. v. Pillsbury*, 50 Cal. 172.

The Supreme Court of Massachusetts has declared the Massachusetts Workmen's Compensation Law constitutional and valid in *Young v. Duncan*, 106 N. E. 1. In *Jeffrey v. Blagg*, 235 U. S. 571, the United States held the Ohio Workmen's Compensation Law valid. The point there raised was that the Ohio law only applied to those employing five men or more. This discrimination the court held to be valid and upheld the law. It will be noted, however, that this law was an elective law, which first went into effect in Ohio, but which has now been changed to a compulsory law.

In Kentucky the Court of Appeals of that State in the case of *Kentucky State Journal Co. v. Workmen's Compensation Board*, held the compensation act in that state invalid for the reason that it violated a provision of the Constitution of Kentucky, which said that the

“General Assembly shall have no power to limit the amount to be recovered for injuries

resulting in death or for injuries to person or property."

No question was raised in that case with reference to the United States Constitution and the court points out that in the states of Washington, Ohio, Wisconsin and New York, which have workmen's compensation, there is no provision similar to section 54 of the Kentucky Constitution, and that court also points out that the compensation act of New York was specially authorized by amendment.

There was a reargument in this Kentucky case reported in 172 S. W. 674, and there the court held that if the employee chose to come in under the law he might do so and the law would be valid as he only could raise the question of its constitutionality.

In the case of *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 108, the court approved of the general scope of the Montana Mining Compensation Law, saying:

"In our judgment, the general scheme of this act is well within the police power of the state. If the people represented by the legislature are of opinion that the public interests demand that industrial insurance ought to be substituted, in whole or in part for actions for wrongs, this court certainly cannot say that they are in error."

The court, holds, however, that as the Legislature did not make it the exclusive remedy, but allowed the employee both to sue and to proceed under the act, it was unconstitutional, saying "the Legislature of Washington guarded against this contingency by abolishing all actions for negligence," as New York has also done in its Workmen's Compensation Law.

The adoption of the compensation principles in so many countries and in so many States of the Union shows that there is a preponderance of opinion that laws of this kind are made necessary to the public welfare. Public opinion is and should be a decisive factor upon the question of any great public policy.

I quote Thomas B. Reed, who was at the same time a statesman, philosopher and a master of expression:

"There is and always has been one tremendous ruler of the human race, a ruler so great that no other despotism has been possible and that rule is that combination of the opinions of all, that leveling up of universal sense which is called public sentiment—that is the ever present regulator and policy of humanity. But it behooves a man to take heed before he begins to run counter to it whether he longs to proclaim a great principle which will free a race or merely wants to wear his hair long down the back."

Law is developed by the judges and the Legislature following the course of public opinion, and assimilating the legal rules and decisions which have come down to the growth of public opinion.

Mr. Justice Holmes, in his chapter on Early Forms of Liability, contained in his book on the Common Law, says:

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of

a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

"On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very consideration which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the

time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

The statute now under consideration is a compulsory compensation or insurance law. The State enacts a law that certain employers of labor engaged in hazardous business shall insure their employees against accident. Such cases are then passed upon by a Commission appointed by the State, which determines the amount of injury and calls upon the insurance carrier to pay the same, the insurance carrier paying the award.

Certain corporations which are able to carry their own insurance do so under the provisions of the act. They take the place as it were of an insurance carrier in which they might have insured. Cases where employers carry their own insurance have the appearance of direct action to enforce liability. But we should consider that self insurance is a concession to those who do not wish to insure in the State fund. If an employer does not wish to pay the premium and receive the protection which the State offers to those who insure in the State fund the State allows such employer to carry his own insurance. The act, however, should be looked at as one for State insurance. That is its main purpose and the option for State insurance is one which is left to the judgment of the employer.

The State in enacting this law proceeds along the lines of similar statutes for the protection of workmen. For example, the laws which have been passed for the use of safety devices, which have been held to be proper.

The principle of compensation is not damages, nor based upon the idea of tort. In principle it is the payment of the employer's share of a common loss in a common undertaking. It has, therefore, none of the injustice of the fictions of our law by which an employer, without real fault, is held liable for damages as though he had done a wrong. This conception of a joint occupational risk is the basis of compensation liability and in practical application it gives general satisfaction and satisfies the natural desire for prompt and certain justice.

Now, with reference to railroads and steamships, and in justification of this act as a police regulation in compelling the insurance of workmen, it may be said that the act (1) promotes safety of travel, safety of employees as well as passengers, (2) by elimination of economical waste, it would enable resources thus wasted to be saved for improvement to plants and facilities of commerce, (3) assurance of certain provisions for employees which attract a better class of employees and hence insures to the public a better class of service, (4) if employees are relieved from exhaustion they may give freer and more efficient service, (5) and may not the State in the exercise of reasonable discretion enact legislation that will relieve injustice and remedy causes of friction and thus promote harmonious relations between capital and labor?—*McLean v. Arkansas*, 211 U. S. 550, (6) the State, *i. e.*, the entire public, is interested that compensation be paid in such amount and such manner that families will be supported decently and not be pauperized or rendered criminal, (7) both the employee and employer are benefited by this system of insurance in the pre-

vention of the vast economic waste now arising from present injury litigation.

We, therefore, submit that the present law, having been expressly authorized by the people, should be upheld by this court.

The United States Supreme Court has in several opinions recognized the force of custom and of public opinion as the underlying basis of all our laws, and indicating that that court will recognize the public opinion expressed in the constitutional amendment adopted in this State and give expression to it as the law of the land and due process of law. So it is stated in *Holden v. Hardy*, 169 U. S. 366:

"An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes, in this country at least, had

been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though, so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies let it be said that so oppressive a doctrine had never obtained a foothold there. The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the States homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority. This case does not call for an expression of opinion

as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado v. California*, 110 U. S. 516; 4 Sup. Ct. 111, 292; 28 L. Ed. 232. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

So in *Noble State Bank v. Haskell*, 219 U. S. 104, Mr. Justice Holmes said:

"It may be said in a general way that the police power extends to all the great public needs, *Canfield v. United States*, 167 U. S. 518. It may be put forth in aid of *what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare*. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits; to such an extent do checks replace currency in daily business. If

then the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. * * *

In the *Legal Tender* cases, 12 Wall, 457, 551, it was settled that the due process clause of the Fifth Amendment must be understood as referring to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power, and that it does not inhibit, and has no bearing upon laws that indirectly work harm and loss to individuals.

In *Walker v. Sauvinet*, 92 U. S. 90, Chief Justice Waite says:

“ A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial

proceedings. (*Murray's Lessees v. Hoboken L. & I. Co.*, 18 How. 280.) Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the Constitution and the laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States."

LIABILITY WITHOUT FAULT

Heinrich Brunner, in his *History of Germanic Law* (1892, 1st ed., vol. II, section 125, p. 549), says:

"The ancient law was harsh. A man was liable not only for harm caused unintentionally, but also for any harm which came about through him; and the liability extended to persons who would in our modern view seem to have had little or no connection with the harm. Excusable accident was not recognized. The law sought to hold somebody liable, and laid hold of him by principles of casual connection which are to us nowadays scarcely comprehensible. The scope of liability was so broadly bounded that it made a man liable for any misfortune which in its origin was somewhere traceable to his region of existence. Certain liabilities were fixed on him by virtue of his clan-relationships, or of his status as guardian, or as householder with a body of free retainers, or as lord of the manor, or as a member of the hundred or the township, irrespective of his privity to the wrongful act. But more than this, the owner of the property was responsible for harm done by his menials, by his domestic animals, and even by his inanimate

chattels. And still further as a tradesman and a master he was under an extensive liability for injuries received by his hired workmen in the course of their service to him. The master paid the 'head money' of a workman who was killed in his service, as well as the damages (at the usual tariff) for lesser injuries, except only when the injury was attributable to some third person, so as to exonerate the master; and the master was also liable for wrongs done by his servants. For example, if a person lost his life accidentally, by fire or water or tree, while in another's service, the master was responsible for the 'homicidium;' and if a person was sent away or sent for, in the service of another, and lost his life on the errand, the employer was regarded as the 'causa mortis.'"

Sir F. Pollock and Frederic William Maitland, in *The History of English Law Before the Time of Edward I* (1899, 2d ed., vol. II, p. 470), say:

"Damages which the modern English lawyer would assuredly describe as too remote, were not too remote for the author of the *Leges Henrici*. At your request I accompany you when you are about your own affairs; my enemies fall upon and kill me; you must pay for my death. You take me to see a wild-beast show or that interesting spectacle a madman; beast or madman kills me; you must pay. You hang up your sword; some one else knocks it down so that it cuts me; you must pay. In none of these cases can you honestly swear that you did nothing that helped to bring about death or wound. * * *

"But the most primitive laws that have reached us seem to point to a time when a man was responsible, not only for all harm

done by his own acts, but also for that done by the acts of his slaves, his beasts, or (for even this we must add) the inanimate things that belonged to him. * * *"

John H. Wigmore, in his *History of Tortious Acts* (1894, *Harvard Law Review*, VII, 315, 383, 442), shows a primitive absolute liability for harm which is universal in all races and that the common law has always known an absolute liability irrespective of negligence. Manifestation of this was the liability of the master to his servant's relatives for his servant's death, even accidental, where the business has been the occasion of the death.

In the next stage, misadventure becomes a ground for appeal to the king to remit the punishment due, killing in self-defense even requiring pardon by the king (Bracton mentions a case of pardon in 1234 of a man who defended himself against a burglar in his own house).

At first there was full absolute liability for damage done by animals. Then the owner was still liable for the wergeld for harm done unintentionally; then exculpation by delivery up of the animal, often accompanied by oath that the owner was not aware of the animal's vice. Fitzherbert (1333): "If my dog kills your sheep, and I freshly after the fact tender you the dog, you are without recovery against me."

Then as to inanimate things, we have first absolute liability and then forfeiture as in the case of *Deodand*. As in the case quoted in Holmes' *Common Law* "If my horse strikes a man and the man dies, the horse shall be forfeited."

Then as to harms connected with a servant. At first here, too, was absolute liability of the master, later modified by surrender at first to the injured families, then to the courts for justice. (Laws of William I C 52).

"All who have servants are to be their pledges, and must have servant before the hundred for trial; if he flees, master shall pay."

About the year 1500 came a sloughing off of the primitive notion that a voluntary act causing harm was inevitably followed by civil responsibility, and a defendant might defend himself by appeal to some standard of moral blame or fault, such an inevitable necessity.

Mr. Justice Holmes in his chapter on early forms of liability in his book on "The Common Law" traces liability for torts to the desire for vengeance.

"The hatred for anything," he says, "giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger."

This principal in the Roman law was called *noxae deditio* and resulted in the satisfaction for damage caused by the giving up of the body of the offender, whether it be inanimate or an animal or a slave. Later the privilege developed of buying vengeance by paying the damage instead of surrendering the body of the offender. Still later, as Mr. Justice Holmes says in said chapter on Early Forms of Liability:

"Ship-owners and innkeepers were made liable *as if* they were wrong-doers for wrongs

committed by those in their employ on board ship or in the tavern, although of course committed without their knowledge. The true reason for this exceptional responsibility was the exceptional confidence which was necessarily reposed in carriers and innkeepers. But some of the jurists, who regarded the surrender of children and slaves as a privilege intended to limit liability, explained this new liability on the ground that the innkeeper or ship-owner was to a certain degree guilty of negligence in having employed the services of bad men. This was the first instance of a master being made unconditionally liable for the wrongs of his servant. The reason given for it was of general application, and the principle expanded to the scope of the reason."

We cannot see how the liability imposed by this compensation statute is any more remote than liability for negligence of a fellow servant. There is certainly no moral delinquency which may be imputed to an employer when a fellow servant is negligent, yet the courts have said that it was proper to abolish the fellow servant rule and hold an employer liable for the negligence of a fellow servant. *Missouri Railway Co. v. Mackey*, 127 U. S. 205. Workmen's compensation is only going one step further and establishing liability for a dangerous agency in place of a dangerous agent. Other cases of liability created without fault may be instanced. Sections 4588 and 4803 of the Revised Statutes formerly provided that there shall be collected from every vessel forty cents per month for every seaman employed on such vessel, which money shall be used for the relief of sick

and disabled seamen. This statute has been on the statute books for nearly one hundred years and has been continuously enforced until repealed in 1884.

In *Rylands v. Fletcher*, 3 H. L. 330, the Lord Chancellor says:

“ The person whose grain or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor’s reservoir, or whose cellar is invaded by the filth of his neighbor’s privy, or whose habitation is made unhealthy by the fumes or noxious vapors of his neighbor’s gas works, is injured without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there) harmless to others so long as confined to his own property, but which he knows will be mischievous if it gets on his neighbor’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences, and upon authority this we think is established to be the law, whether the things so brought be beasts or water or filth or stench.”

In the case of *Thomas v. Winchester*, 6 N. Y. 397, it was decided that a vendor of certain dangerous drugs was liable for the damage caused by those drugs to persons for whom they were not intended.

At common law a man was held responsible for damages done by his escaping cattle, no matter how careful he may have been in keeping them.

R. R. Co. v. Munger, 5 Denio 255.

Wells v. Howell, 19 Johnson (N. Y.) 385.

Noyes v. Colby, 30 N. H. 143.

Wagner v. Bissell, 3 Iowa, 396.

R. R. Co. v. Rollins, 5 Kan. 98.

Similar liability existed for damage done by wild or vicious animals.

Muller v. McKesson, 73 N. Y. 195.

So one who for a lawful purpose and without negligence explodes a blast on his own land and thereby causes a piece of wood to fall upon a person traveling in a public highway is liable as a trespasser for the injury thus inflicted.

Sullivan v. Dunham, 161 N. Y. 290.

In *Railway Co. v. Emmons*, 149 U. S. 364, the court sustained the validity of a statute of the state of Minnesota which required railroad companies to fence their tracks and made them absolutely liable for stock killed and also liable for all damages sustained by persons in consequence of the failure to fence.

In *Jones v. Brim*, 165 U. S. 180, a statute of Utah imposing absolute liability upon any person driving an animal over a public highway on a hillside for damage done by such animal in destroying banks, etc., was held proper under the police power of the state.

The Carmack amendment to the interstate commerce act which in terms makes the initial carrier liable to the shipper for loss or damage to goods, even though the loss or damage occurs on the line of another carrier and through the negligence of that carrier, was held valid in the case of *Atlantic, etc., R. R. Co. v. Riverside Mills*, 219 U. S. 186.

Statutes making railroads liable, without regard to negligence, for injuries to property caused by fires create liability without fault, and have been upheld by all the courts of the states in which they have been enacted, as well as by the Supreme Court of the United States.

Atchison, Topeka & Santa Fe R. R. Co., v. Matthews, 174 U. S. 96.

Railway Co. v. Humes, 155 U. S. 513.

Railway Co. v. Matthews, 165 U. S. 1.

It is true that fire is a dangerous agency, but so are railroad engines, and cars, and shops and steamships. In fact, the business of transportation generally is dangerous and the same principle that makes an absolute rule of liability reasonable in respect to the agency of fire would support an absolute rule in respect to other dangerous agencies and occupations. And employment need only be dangerous in a general sense, for where classification is justified for the general hazard of the business, legislation need not be confined to employees engaged only in the hazardous part of the service, but may extend to all employees.

Louisville & Nashville R. R. Co. v. Milton, 218 U. S. 336.

McLean v. Arkansas, 211 U. S. 550.

So statutes providing that any landlord who knowingly leases his premises for saloon purposes shall be liable for losses resulting from intoxication caused by the sale of liquor by his lessee.

Bertholf v. O'Reilly, 74 N. Y. 509.

The sale of liquor was proper at common law and there was no common-law liability flowing therefrom.

Statutes imposing a liability upon fire insurance agents for the benefit of a fund to care for and cure sick and injured firemen have been upheld.

Fire Department v. Noble, 3 E. D. Smith, 440.

Exempt Firemen's Fund v. Roome, 29 Hun. 391.

So, a statute of Nebraska makes a railroad liable in damages for injuries sustained by a passenger, regardless of the question of negligence on the part of the company. This was sustained by the United States Supreme Court in *Chicago R. I. Ry. Co. v. Zernecke*, 183 U. S. 582. Justice McKenna in the *Zernecke* case says:

"Our jurisprudence affords example of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants."

In *Chicago v. Sturges*, 222 U. S. 313, the court sustained an act of Illinois making a municipality liable for three-fourths of damage to property within its limits caused by a mob. The court in that case says:

“ It is said that the act denies to the city due process of law since it imposes liability irrespective of any question of the power of the city to have prevented the violence or of negligence in the use of its power. This was the interpretation placed upon the act by the supreme court of Illinois. Does the law as thus interpreted deny due process of law? That the law provides for a judicial hearing and a remedy over against those primarily liable, narrows the objection to the single question of legislative power to impose liability regardless of fault.

“ It is a general principle of our law that there is no individual liability for an act which ordinary care and foresight could have guarded against. It is also a general principle of the law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing there lies the legislative power, which, in the absence of organic restraint may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent.”

We have also, as an illustration, the Oklahoma Depositors' Guaranty Law, which authorizes the assessment and collection of a certain per centum in the daily average deposit of each and every bank organized under the laws of the State as a fund to pay the losses caused depositors by failing and insolvent banks. This act was upheld by the United States Supreme Court in *Noble State Bank v. Haskell*, 219 U. S. 104.

DUE PROCESS OF LAW

Chapter 39 of Magna Charta (sometimes referred to as chapter 29) confirmed on the 19th day of June, 1215, declared that

"no freeman shall be taken or imprisoned or deceased or outlawed or exiled or otherwise destroyed; nor shall they go upon him nor send upon him but by the lawful judgment of his peers or by the law of the land."

This may be taken as the starting point for the phrase "due process of law," although it has often been said that the principle was known before Magna Charta. It was originally designed to secure the subject against the arbitrary action of the crown and to place him under the protection of the law. Such action had been used by King John in arbitrarily taking the property of English subjects, and it was to limit the power of the executive that this concession was wrung from him. Although it has been a principle of English law now for seven hundred years, in England it has never been contended that it limited the power of the Legislature; so that they have a phrase that Parliament can do anything except to make a man a woman. In this country this phrase "the law of the land" was first introduced into the constitutions of the State Legislatures. Subsequently it was changed to "due process of law," which has been declared to be the equivalent of the phrase "law of the land."

Mr. Justice Field says in the case of *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 519:

"In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally

designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land.' And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property. But, from the number of instances in which these words are invoked to set aside the legislation of the States, there is abundant evidence, as observed by Mr. Justice Miller in the case referred to, "that there exists some strange misconception of the scope of this provision, as found in the Fourteenth Amendment." * * * *

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

Due process of law, or the law of the land, means the law of the State in which the proceeding is brought. It cannot mean the general body of the law common or statute which was in existence at the time the Constitution or the constitutional amendment took effect, for that would be to deny to the Legislature the power to change or amend the law. Due process of law and the equivalent phrase, law of the land, have frequently been defined to mean a general and public law

operating equally on all persons in like circumstances.

The occasion of the adoption of the fourteenth amendment, together with the thirteenth and fifteenth, was the protection of the negro who had been recently emancipated, and to secure to him the same rights and privileges as were accorded to white men in the same state. There was no intention on the part of the congress which proposed and the legislatures which adopted these amendments to do away with the power of the states to make laws which would be applicable to the entire community. This was stated by Mr. Justice Miller in the *Slaughter-House* cases, 16 Wallace 82, in which this amendment was first considered. He says:

“ * * * we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

“ But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long

as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

The government of this country is one of delegated powers. Such powers and such only are conferred on the central government as are necessary for national existence and for the proper regulation of the states with each other. All powers not conferred upon the general government of the United States are reserved to the states or to the people. Necessarily to the states are left those subjects for legislation as touch domestic affairs. Laws with reference to master and servant belong in the same category with parent and child, husband and wife. While the general government by reason of the interchanges of commerce between states must exercise its regulating functions, yet it is extending the subject of commerce beyond its legitimate scope when it is sought to interfere with the subject of master and servant where a state wishes to legislate in a broad and comprehensive manner for all the servants within its borders. It is necessary to the proper harmony between state and national government that the State should have jurisdiction of that subject.

The theory of the Workmen's Compensation Law is a regulation of the law of master and servant. Taking account of the new conditions which have arisen within the last hundred years, it is found that the old law of negligence is not applicable to new and modern conditions. And why has not the State as much authority to change the law of master and servant to fit modern conditions as it would have to make changes in

the law of parent and child or in the law of husband and wife? No one would contend that the Legislature had not the power to increase or diminish, or even abolish, the causes for divorce.

So it has been held and stated by Chief Justice Waite in the case of *Mann v. Illinois*, 94 U. S. 134, that

“A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”

This new principle of compensation writes into the law of master and servant that on account of the hazardous nature of certain employments the master shall insure his servants against accidents which are bound to occur. So it was contended when the State of New York passed a law providing for electrocution in place of hanging that because hanging had been in vogue for time out of mind punishment by electrocution was not due process of law. But this court held otherwise and Chief Justice Fuller said *In re Kemmler*, 136 U. S. 448:

“The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal governments

to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily, with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. * * * in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order."

So this court has held that trial by jury might be waived by one accused of murder. (*Hallinger v. Davis*, 146 U. S. 314.) Nor does it forbid prosecution for felonies by information without indictment by grand jury. (*Hurtado v. California*, 110 U. S. 516, 534.) Nor is it necessary in suits at common law that they should be tried by jury. (*Walker v. Sauvinet*, 92 U. S. 90.)

Unless these and other changes can be made in the law as public sentiment demands, as was pertinently remarked by Mr. Justice Moody in the case of *Twining v. New Jersey*, 211 U. S. 101, "the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment." That, says Mr. Justice Matthews in the case of *Hurtado v. California*, 110 U. S. 529, would be "to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." Mr. Justice Matthews also says in the same case:

"There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

So Mr. Justice Holmes says in the case of *Lochner v. New York*, 198 U. S. 45:

"Every opinion tends to become a law. I think that the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would

admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our laws."

New rights of action may be created by a Legislature and old rights may be taken away. When the Congress of the United States provides that railroads should use certain safety appliances, and that if they do not use them it shall be evidence of negligence on the principle that he who employs the dangerous instruments of modern industry for his profit should be held responsible for a share of injuries which they inevitably produce, it creates a new right of action. So also about sixty years ago the legislatures of the different states commenced to give a new right of action for deaths caused by negligence, and now it is almost a universal rule established in all the states by legislation.

THE ACT PROVIDES FOR DUE PROCESS OF LAW IN RESPECT TO NOTICE

The act provides for notices on the part of the employee and the employer and also for a public hearing where testimony can be taken and gives a right of appeal on questions of law. This is sufficient to satisfy the Fourteenth Amendment.

Due process of law has never received any exact definition. In the case of *Standard Oil Co. v. Missouri*, 224 U. S. 270, 287, it is said:

"The fourteenth amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard

which is essential to due process of law. When that has been done, the requirements of the Constitution are met."

So Mr. Justice Moody, in *Twining v. New Jersey*, 211 U. S. 78, 110, said:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction * * * and that there shall be notice and opportunity for a hearing given the parties. * * * subject to these two fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries. This court has up to this time sustained all state laws, statutory, or judicially declared, regulating procedure, evidence and methods of trial and held them to be consistent with due process of law."

Due process of law does not mean necessarily a judicial hearing, but it has been applied to service of notice for the enforcement of liens for taxes and assessments on real estate of resident and nonresident owners.

So in *Davison v. New Orleans*, 96 U. S. 97, 104, the court says:

"That whenever by the laws of a state or by state authority a tax assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for the mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said

to deprive the owner of his property without due process of law however obnoxious it may be to other objections."

To the same effect is *Ballard v. Hunter*, 224 U. S. 255. The rule has also been applied to executive officers. For instance, the issuing of fraud orders by the post-office department.

Public Clearing House v. Coyne, 194 U. S. 497.

So it is held in *Reetz v. Michigan*, 188 U. S. 505, that there is no provision in the Federal Constitution forbidding a State from granting to a tribunal, whether called a court or board of registration, the final determination of a legal question. In that case a State statute was attacked which created a board of registration in medicine.

So Mr. Justice Matthews, in *Hurtado v. California*, 110 U. S. 516, speaking for the court says:

"It follows that any legal proceeding enforced by public authority, whether sanctioned by ancient custom or newly devised in the discretion of the legislative power in the furtherance of general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

THE ACT DOES NOT DENY THE EQUAL PROTECTION OF THE LAW

The law as passed is one of general application, applicable to all workmen engaged in certain hazardous employments in the State of New York. The longshoremen who are included in

Group 10 are workmen who live within the State and who are called upon to work for the steamships or other vessels which enter New York harbor. Plaintiff in error contends that its situation is different from other employers because the claimant has two remedies, one in admiralty and one under the Compensation Law. That would not be so in this case as plaintiff in error claims there was no negligence or wrong on its part, so that there is no remedy in either admiralty or common law, and the only remedy is this one of compensation.

It may be a doubtful question as to whether the case would come under admiralty at all, as the claimant's intestate was on the gang plank which connected the land with the ship, and it might be contended that the gang plank was an extension of the shore and not a part of the ship. Actions for injuries to a stevedore seems to be limited so far as admiralty's jurisdiction is concerned, to injury upon the vessel only. *Atlantic Transport Line v. Imbrovek*, 234 U. S. 52.

Where a fire started on a ship but was communicated to the wharf and packing houses — Held that the damage having been consummated on land, it was not a case of admiralty jurisdiction.

The Plymouth, 3 Wall. 20.

Libelant, who was engaged in repairing a vessel which lay at a wharf, attempted to descend a ladder connecting the wharf with the bulwark of the vessel. In descending the ladder it slipped and libelant was thrown upon the wharf and injured. Held that a court of admiralty had no jurisdiction.

H. S. Pickands, 42 Fed. 230.

To same effect a stevedore working on the dock discharging a vessel.

Swayne & Hoyt v. Barsch, 226 Fed. 581.

Where a vessel struck a bridge a span of which fell into the water its fall into the stream did not so disconnect it with the land as to make it a maritime tort.

Martin v. West, 222 U. S. 191.

So it was held in *Cleveland Terminal Co. v. Steamship Co.*, 208 U. S. 316, that damage to a shore dock and bridge, protection piling and pier was non-maritime. The court says: "They were structures connected with the shore and immediately concerned commerce on land."

Further, no action *in rem* is given by the statute of the State or by Congress for the death of a person caused by negligence and therefore there is no cause of action *in rem* in admiralty. *The Corsair*, 145 U. S. 335. This seems to be the last utterance of the United States Supreme Court on the subject. There being no law either State or national giving a right of action *in rem* for death, there is only one remedy in this case, viz., a right of action *in personam* for the death of Jensen, enforceable either in the State courts or the United States courts. The Workmen's Compensation Law would therefore be a defense to an action brought in admiralty *in personam*. *Stoll v. Pacific Coast Steamship Co.*, 205 Fed. 169; *Fred E. Sanders*, 212 Fed. 542; *Schweitzer v. Hamburg-American Line*, 149 App. Div. 900; 78 Misc. 448.

But assuming the case in negligence *in rem* both in admiralty and common law, there are two remedies. All that the Workmen's Compensation Law does is to substitute a remedy for the common law remedy, making two remedies as before. While there are two remedies, there may

be only one recovery. The Workmen's Compensation Law requires that the claimant shall sign a release of any other right or cause and assign to the person or corporation liable for such compensation all his right, title and interest in any cause of action. (Sec. 29.)

We think also that if a steamship company secures the payment of compensation by contributing premiums to the State fund it thereby becomes relieved from all liability, whether in admiralty or otherwise. Section 53 provides that

“an employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or deaths sustained by his employees.”

If the steamship company carries its own insurance as in the case at bar there is certainly no double liability as it responds in admiralty or under the compensation statute whichever is invoked.

THE COMMERCE CLAUSE OF THE CONSTITUTION

The plaintiff in error claims that the requirement for insurance against injury provided in this statute is obnoxious to the commerce clause of the Federal Constitution. This contention was raised in the *Stoll* case, 205 Fed. 169, which held the Washington compensation law constitutional, and the court there said:

“Congress having in no way legislated in the premises, at least so far as interstate commerce by water is concerned, the state has the right to enact laws incidentally af-

fecting interstate commerce. These acts do no more."

In *Sherlock v. Alling*, 93 U. S. 99, the United States Supreme Court held that until Congress made some regulation touching the liabilities of parties for marine torts resulting in the death of persons, the statute of Indiana giving a right of action to personal representatives of the deceased applied and constituted no encroachment upon the commercial power of Congress. The court says:

"The position of the defendants, as we understand it, is, that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

"In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the states cannot by legislation place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment

to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in *The Passenger* cases, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In the *Wheeling Bridge* case, 13 id. 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 id. 227, the statute of Alabama required the owner of a steamer navigating the waters of the State to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile county, a statement in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the State in addition to those prescribed by Congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of Congress, as in *Brown v. Maryland*, 12 Wheat. 425, *State Tonnage Tax* cases, 12 Wall. 204 and *Welton v. Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom. In the

present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or inter-state commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts, or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

“ It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-state commerce, the persons engaged in it, and the instruments by

which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

“The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or

engaged in commerce, foreign or inter-state, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constituted no encroachment upon the commercial power of Congress. *United States v. Bevans*, 3 Wheat. 337."

**THE PLAINTIFF IN ERROR HAS WAIVED
THE QUESTION OF THE CONSTITUTION-
ALITY OF THE ACT**

The plaintiff in error in this case is a self-insurer (pp. 1, 5), and is, therefore, taking advantage of the law which allows it on account of its immense resources to act as its own insurance carrier and thus avoid any penalties that are prescribed by the law. Having thus taken advantage of the law, none of its servants can sue it for damages arising from negligence under section 11.

See *Musco v. United Surety Co.*, 196 N. Y. 459. In 1907 the Legislature had passed an act to regulate the taking of deposits by certain persons, firms and corporations. The appellant in the *Musco* case gave the bond required by the law, but in a suit brought upon the bond the question was raised that the statute was unconstitutional. The court says:

"The appellant and its principal have waived any question concerning the consti-

tutionality of the act in question. That act in effect prohibited appellant's principal from carrying on the business of receiving deposits unless he should execute an undertaking as herein provided. Conversely in effect it authorizes him to conduct such business if he should execute such bond. He very well may have concluded that it would be to his advantage in the conduct of the business to give such a bond, whether he could be compelled so to do or not, and he executed one. Having done this and respondent's assignors having made deposits with him as we must assume on the faith of such undertaking, neither he nor his surety can raise the question of constitutionality, for it is well settled that an individual may waive even constitutional provisions, if for his benefit, when no question of public money or public morals is involved. (*Mayor, etc., of New York v. Manhattan Ry. Co.*, 143 N. Y. 1; *Cooley's Constitutional Limitations* (7th ed.) page 250)."

"The appellant seeks to break the force of an apparent waiver by its principal by insisting that the undertaking was executed under duress, the act providing that a person who carried on the business in question without executing such undertaking should be guilty of a misdemeanor. * * * * *

If the act requiring the principal to execute an undertaking was unconstitutional and void, he must be assumed to have known it at the time and he was entitled to believe that no one would attempt to enforce against him an unconstitutional act."

In the case of *Eustes v. Bolles*, 150 U. S. 361, the same principle is stated. In that case the petitioner, Eustes, had proven a claim against assignees in an insolvency proceeding. Afterward there were composition proceedings in

which it was sought to discharge Bolles. Petitioner Eustes appeared and objected on the ground that the composition act of Massachusetts was in violation of that part of the Constitution of the United States which forbids any State to pass a law impairing the obligation of contracts. The court held that the record disclosed that Eustes had accepted and receipted for the money awarded to him under the insolvency proceedings and "that the court below, conceding that his cause of action could not be taken away from him without his consent, by proceedings under statutes of insolvency passed subsequently to the vestings of his rights, held that the action of Eustes in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes and that, accordingly, the defendants were entitled to the judgment." The Supreme Court, therefore, held that as the court below had decided that there was a waiver of any question under the Constitution of the United States, there was no federal question for that court to decide.

In the case of *Daniels v. Tearney*, 102 U. S. 415, the Convention of the State of Virginia had passed an ordinance of secession and afterwards passed an ordinance whereby the debtor against whom there was an execution in the hands of an officer might offer a bond as security for the payment of the debt and costs, when the operation of the ordinance should cease and that then no sales should be made under the execution without consent of parties interested. After the end of the war, action was commenced on a bond given under this ordinance. The court held the ordi-

nance unconstitutional and invalid as in aid of secession and in conflict with the contract clause of the national constitution, but further held that defendants were estopped from raising that question.

The Supreme Court of Wisconsin have also directly held in case of *Mellen Lumber Co. v. Industrial Commission of Wisconsin*, 142 N. W. 187, that an employer who elects to come in under the Workmen's Compensation Law cannot raise the question of the constitutionality of the statute.

This is not a case where the deterrent nature of the excessive penalties prescribed in the act for noncompliance with its terms is such that the appellant is excused from avoiding the risk of the penalties, and so is not precluded from testing the constitutionality of the act.

The penalty for not coming under the act is prescribed in section 50, which is "that the employer shall be liable to an amount equal to the pro rata premium which would have been payable for insurance in the State fund for the period of noncompliance." Even this penalty may be remitted by the commission. This is really not a penalty at all, as it merely charges the employer the same amount for compensation insurance as he would have paid had he come in under the act voluntarily.

It also appears under section 118, that if any section or provision of the act should be declared unconstitutional by the courts, that should not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional. The cases therefore hold that drastic penalties do not preclude one who is aggrieved from testing the validity of an act do not apply.

In the case of *Rail River Coal Co. v. Yapple*, 236 U. S. 338, it was held that a penalty of from \$300 to \$600 imposed by the so-called Ohio "Run of Mine," or "Anti-Screen" law for each separate violation of that act is not so great as to render the statute open to the objection that it denies the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution by preventing a resort to the courts to test the constitutionality of the law.

**THE FEDERAL EMPLOYERS' LIABILITY
LAW DOES NOT APPLY TO THE PLAIN-
TIF IN ERROR, AS IT, SO FAR AS THIS
CASE IS CONCERNED, IS A STEAMSHIP
AND NOT A RAILROAD COMPANY**

The record shows that the plaintiff in error operates a line of steamships, sailing between the ports of New York and Galveston. The fact that the plaintiff in error is also a railroad company does not make it a railroad carrier so far as the steamship lines are concerned, and the defendant itself in its answer to the question as to the kind of business done, says "transportation of steamships engaged solely in inter-state commerce." (p. 4.)

It is true that the Federal Employers' Liability Law does speak of boats and wharves, but in connection with cars, engines and other railroad equipment. It is no doubt true that where there are boats or wharves at the termini of railroads the railroad carrier would still retain its character as a railroad carrier as to such wharves

and boats. The ferries plying between New Jersey and New York City for the great railroad systems which terminate in Jersey City are extensions of the railroad systems and the ferries thus managed, being a part of the railroad system, come under the act as was held in the case of the *Passaic*, 190 Fed. 644. But it would not be a reasonable extension of the act to call a steamship company a railroad carrier, when it is transporting freight and passengers from New York to Galveston. Supposing suit should have been brought against the defendant as a railroad carrier for an injury happening on board ship before the passage of the Workmen's Compensation Act, under the Federal Employers' Liability Act, could such an action be maintained? We think not.

CONSTRUCTION OF THE ACT

So far as the Court of Appeals of the State of New York have construed section 114 or group 10 of section 2 or any other provision of the act, providing such construction does not offend against a provision of the United States Constitution, this court will adopt such construction.

Fairchild v. Gallatin Co., 100 U. S. 47.
Old Colony Trust Co. v. Omaha, 230
 U. S. 100.

Respectfully submitted,

EGBURT E. WOODBURY,

Attorney-General of the State of New York.

E. CLARENCE AIKEN,

HAROLD J. HINMAN,

Of Counsel.

Office Supreme Court, U. S.

FILED

JAN 30 1917

JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 280.

SOUTHERN PACIFIC COMPANY,

Plaintiff in Error,

against

MARIE JENSEN, ET AL.

In Error to the Supreme Court, Appellate Division, Third
Judicial Department of the State of New York.

Supplemental Brief of the New York State Industrial Commission

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ALBANY, N. Y.

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Of Counsel



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 16

SOUTHERN PACIFIC COMPANY,
Plaintiff-in-error,

against

MARIE JENSEN,
Defendant-in-error.

No. 280.

SUPPLEMENTAL BRIEF OF STATE INDUSTRIAL COMMISSION OF NEW YORK

THE WORKMEN'S COMPENSATION LAW OF NEW YORK SUMMARIZED

This law is printed in full in the briefs filed in the cases of New York Central R. R. Co. vs. White, and New York Central R. R. Co. vs. Winfield.

This law enumerates certain hazardous occupations in forty-two groups, and provides that compensation shall be payable for injuries or death sustained, *arising out of and in course of the employment* by employees engaged in any one of those employments. The compensation for injuries amounts to two-thirds of the weekly wages of the employee during his disability, except that no compensation is allowed for the first two weeks. Medical treatment is provided for the first sixty days during which the employee is disabled, and funeral expenses to the amount of \$100 are allowed in case of death.

In case of death the widow is allowed 30% of the average wages of the deceased during her widowhood, unless she remarries, in which case she is allowed two years' compensation in one sum.

Children are entitled to compensation until they arrive at the age of eighteen years, amounting to 10% of the wages of the deceased. The law provides for the payment of the compensation in weekly or monthly installments, so that the employee or dependent shall use it for his support and not waste or spend it.

In case of permanent partial disability, such as the loss of a hand or leg, an arbitrary number of weeks is fixed for said loss.

In order to insure the payment of the compensation and to distribute the loss among all employers of labor, the law provides that the employer shall insure either in the State Fund, which is created, or in an insurance corporation. Provision is made, however, that if the employer shall satisfy the State Industrial Commission of its ability to carry its own insurance, and shall make such deposit of securities or cash as may be required, it may be allowed to carry its own insurance. That was done in all of the cases before this court.

The method of carrying out this self-insurance is indicated in the case of the New York Central, in which the correspondence and agreements of the New York Central Railroad are set forth and printed in the record. The application and the insurance agreement of the New York Central show that they were designed to cover all the employees who should come under the law, whether they are interstate or otherwise. The New York Central Railroad Company requested the State Industrial Commission to find that its employees were interstate, that is 98% of them, and were not covered by the law, which the State Industrial Commission declined to find but required the New York Central Company to deposit \$300,000 in bonds and \$30,000 in cash to cover its payroll.

The law provides for release from all liability for personal injuries or death sustained by the employees of those who contribute premiums to the State Fund. Failure to insure in one of the ways pointed out renders the employer liable to a penalty in an amount equal to the pro rata premiums which would have been payable by insurance in the State Fund. The Commission may, however, for good cause remit any such penalty. Furthermore, an employer who does not insure is liable at the option of the employee to a claim for compensation

or an action for damages, in which the defenses of fellow servant, contributory negligence, and an assumption of risk are taken away from the employer.

A State Industrial Commission is provided for, consisting of five members, who shall have jurisdiction to make the awards under the law. From these awards an appeal may be taken to the Appellate Division of the Supreme Court and from that to the Court of Appeals.

Under this law since July 1, 1914, when the law went into effect, the State Industrial Commission has made approximately 112,000 awards, of which 2,100 were death cases. This represents payments made and in process of paying, of approximately \$25,000,000. The average award is about \$160 and the average for medical services \$11.00. Death cases where awards are commuted amount to about \$5,000 each. Each working day during 1916 on an average 5 employees were killed, 21 permanently crippled or maimed, and 174 suffered serious temporary injuries.

In the present case the present value of the annuity of \$305.24 to the widow Marie Jensen, at the age of 29, computed according to the Carlisle tables in use in the courts of New York, is \$4,545.79, assuming that she does not remarry, and the total amount to be paid to the two children, if they live to the age of 18 years, is \$2,649.52, or a total of \$7,159.31. If the contingency of the remarriage of the widow and the death of the children be taken into account, the amount would, of course, be less.

CONFLICT WITH ADMIRALTY JURISDICTION

The plaintiff-in-error makes a new point in his brief on reargument, based upon the section of the Revised Statutes, 4283 (now 8021), which allows a ship owner to limit his liability for damage, where occasioned or incurred without privity or knowledge of such owner, to the amount or value of the interest of such owner in such vessel and her freight then pending. That is the main reason for this supplemental brief.

While Congress has legislated upon this subject of limitation of liability, it is not legislation that excludes action in the State courts. It is in effect similar to the Bankruptcy Law.

City of Boston, 182 Fed. 174.

A proceeding limiting liability of ship owners is not an action in rem but is sui generis which takes rather the character of an action in personam (*In re Morrison*, 147 U. S., 14), and it applies to non maritime torts (*Richardson vs. Harmon*, 222 U. S., 96), and it also applies to the cases of personal injuries as well as to cases of loss or injury to property.

Butler vs. Boston & Savannah S. S. Co., 130 U.S., 527; *Craig vs. Continental I. & S. Co.*, 141 U. S., 638.

Personal representatives of passengers and of members of the crew may recover in the proceedings for limitation of liability, or liability created by state or foreign law in favor of the personal representatives of a person whose death is caused by violence or negligence.

Old Dominion S. S. Co. vs. Gilmore, 207 U. S., 398; *Deslions vs. La Campagne Generale Trans Atlantic Co.*, 210 U. S., 95.

So a bankruptcy proceeding is sui generis, but does not oust the State of jurisdiction of all actions and proceedings unless the man becomes bankrupt and has to invoke the aid of the Bankruptcy Court.

In bankruptcy creditors may prove their claims in the Bankruptcy Court and receive only their pro rata share of the assets as dividends, in which bankruptcy proceedings orders may be entered staying the bringing or continuing of actions against the debtors. The Supreme Court Rule in Admiralty, (56), which governs proceedings to be taken for the limitation of liability, allows a contest as to the validity of the claims just as there may be contest in bankruptcy. Where, however, a ship owner does not institute proceedings until after a damaged claimant has recovered a judgment against it in the State court, it is concluded by the decision of the State court on all the issues involved in the action before it.

In re P. Sanford Ross, 204 Fed. 248; *Mongahela River Consolidated Coal & Coke Co. v. Hurst*, 260 Fed., 711; *Gleason v. Duffy*, 116 Fed. 298.

The case of *Slater v. Mexican Railway Co.*, 194 U. S., 120, cited by plaintiff-in-error, held that the Court had no machinery to enforce the Mexican Law.

The proceeding in question is not one which takes the place of a common law remedy or a statutory remedy, but is merely in limitation of any and all remedies which exist where the value of the interest of the owner in the vessel is less than the total amount of liabilities.

Plaintiff-in-error in said fourth point, says "It is not disputed that the present case comes under admiralty jurisdiction." While it is important to have the decision of this court as to any apparent conflict with admiralty law, we cannot let the above statement go unchallenged.

1. There was no right *in rem* on the part of Marie Jensen to proceed against the vessel as her right of action, assuming there was negligence, was in pursuance of the laws of the State of New York. That right of action having now been taken away, she has no remedy either in admiralty or at common law.

2. It is a question as contended in our main brief as to whether the accident occurred on the vessel. It occurred on the gang plank which connected the vessel with the land.

3. There was no negligence in either this case or that of Clyde Steamship Company against Walker, and so no liability in admiralty or common law.

THE INSURANCE FEATURE

The question was asked on the first argument as to the power of the State to require insurance, and that if it could require it for accidents why could it not require it for any other purpose.

So far as the police power of the State is concerned, we do not see why the insurance principle may not be extended to embrace other forms of relief. In Germany and Great Britain, and in other foreign countries we have seen the principles of insurance extended to old age, pensions, unemployment, health and occupational disease, and in this country the law making powers are taking more and more into account the general

conditions of the earning class. These forms of insurance are advocated by Governor McCall, in his message to the legislature of Massachusetts, in January, 1917. Under the police power, we take it that the State has a right to compel the vaccination of children who attend the public schools, and the inoculation of soldiers for typhoid fever.

The relation of fatigue to service has also been recognized by laws providing for maximum hours of service. Tenement housing laws have been passed to remedy insanitary housing and community surroundings. It is recognized that over work, insanitary housing and lack of nutritious food are frequent causes of sickness, and sickness reduces the family's economic status by entailing extra expenses and loss of wages. The law has not only taken jurisdiction of these matters, but of water supply, sewage disposal, impure food and misuse and unrestricted sale of drugs. Investigation has shown that poverty and disease are in partnership, and are detrimental to a community.

Health insurance in Germany, which has been in operation for a quarter of a century, has exercised a positive influence upon the prevention of disease and the prevention is frequently the purpose of insurance and certainly its result.

Health insurances have been established in Germany, Austria, Hungary, Norway, Great Britain, Servia, Russia, Rumania, France and Italy. Old age insurance is established under governmental authority and subsidy by the governments of Italy, Servia and Spain, while old age pensions have been established by the governments of Denmark, Iceland, Switzerland and New Zealand.

Unemployment insurance has been adopted in Great Britain and is rapidly being adopted in European cities. (See Public Health Bulletin No. 76 on Health Insurance, pages 36 to 43, 49 to 55 and the appendices.)

While, therefore, I do not advocate I can see no insuperable objection to a policy of State insurance which extends beyond that of compensation for accidents, so far as the question of the police power of the State to enforce such a system is concerned. This, of course, leaves out the question of the

14th Amendment in that of requiring one person to pay for the benefit of another. As to whether there is equal protection and due process of law comes up under the point of liability without fault. Where there is a liability which comes under State jurisdiction, the State, under the police power, would have the right to compel enforcement of the liability by insurance as was approved by this court in the Noble State Bank case. Insurance might be ordered, we submit, to provide for taxes. It might be ordered for all injuries due to negligence. Workmen's Compensation insurance being based upon the principle of averages takes the principal of a common peril in a common venture and distributes the consequences of that peril, not unlike the principle which under the name of general average is familiar to maritime law. The contribution of the injured employee to this common peril is one-third of his wages during his disability, plus two weeks in addition besides the pain and suffering which he suffers.

The extent to which the State may go in extending the principle of insurance depends on the attitude of society. The police power in general will extend so far as society wills it to extend. As stated by Mr. Justice Holmes in Noble State Bank of Haskell:

"It is asked whether the state could require all corporations or all grocers to help guarantee each other's solvency and where we are going to draw the line. But the last is a futile question and we will answer the others when they arise. With regard to the police power as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

MORAL FAULT

Fault as here used means, I think, some infraction of the moral law, the commission of some immoral act, or the omission to do some act which we owe as a duty under the moral law.

If by the moral law is meant the preponderant opinion of the people, which changes from time to time, it would not be difficult to harmonize the Workmen's Compensation Law with

prevailing morality, for it has received the unqualified approval of the majority of the people.

If, however, instead of an elastic, yielding and ever changing moral law, reference is made to some definite moral code as a foundation of civil rights and liabilities, then we say there is little or no connection between civil rights and remedies and moral fault.

I take it in civilized countries the ten commandments may be said to epitomize the moral law as generally understood. Now we venture to assert that the moral law is the foundation of but very few civil liabilities and practically all the liabilities to which men are liable in actions are to remedy primary rights which have been declared by the government in a code of laws. In other words, that civil liability is based upon commands of the government or law making power and not upon any code of morals.

If we take up the ten commandments, there is certainly no civil liability to be founded upon the first three. In the fourth commandment, which provides for the observance of the Sabbath, there is no civil liability and no criminal liability, unless it is created by statute, for example the laws against selling liquor upon Sunday or prohibiting the playing of games like baseball. Otherwise we have no liability.

In the fifth commandment there is no civil liability, although a very effective liability in the right of chastisement, which is universally conceded to the parent.

The sixth commandment, thou shalt not kill, is the basis of criminal liability and is the basis also of civil liability. It was not, however, the basis of civil liability for negligent killing until the passage in England of the Lord Campbell Act in 1844, and subsequent acts passed by the different states in this country. Here, however, we have a civil liability which did not exist, although the moral law justified it until the passage of the law by the law making powers.

The seventh commandment, thou shall not commit adultery, is not the foundation of a civil liability, except as a remedy for dissolution of the marriage tie, and in some cases for civil damages. However, in England, it is not even the foundation

of a civil liability for divorce against the man, unless adultery is accompanied by cruelty and in many of the states other causes are made by law as reasons for dissolution of the marriage tie.

It may be conceived that in a socialistic state in which property is held in common by the whole community that there might be no violation of the commandment, thou shalt not steal, as there would be no individual property to steal and probably no individual liability at all only public or criminal liability. Under our present laws it is sometimes asserted that the eighth commandment may be violated by due process of law.

The ninth commandment, providing against false swearing, is the foundation for a criminal liability, but not a civil liability. There seems to be no legal liability for the sin of covetousness provided for in the tenth commandment.

On the other hand it may be said that there are many remedies and civil liabilities created by statute, irrespective of any moral law; such as laws with reference to pure foods and drugs, ordinances with reference to speeding and liabilities therefor, laws making those who sell liquor or who rent buildings for that purpose civilly liable.

Sentiment with reference to liquor traffic has changed from age to age. It might be said that in the opinion of the large proportion of our population the most important commandment now is, thou shalt not drink intoxicating liquors. The sentiment following this commandment has become expressed in the laws of many states prohibiting the manufacture or sale of intoxicating liquors.

The truth is that both law and morality have their origin in the prevailing opinion of the people, which acts so far as morality is concerned by public sentiment, and if the public sentiment is strong enough expresses itself in the law of the land. It thus becomes the law of the land and hence due process of law.

The People of the State of New York by their vote have willed that the liability which rested upon a fiction of the law which imputed liability for some supposed fault either by disobeying the command of the statute, in reference to safety appliances, or some other command of the Legislature or the

common law, has substituted in its place a liability for injuries arising out of and in the course of the employment. This liability is one which we affirm enters into consideration of juries in the trial of cases of so-called negligence, verdicts being found because the juries considered that the accident arose out of the employment.

All the casual elements which apply to negligence cases remain in compensation cases except the imputed fault of the owner of the employing agency or business. The real causes of hazard of the business and the inception of the accident in that hazardous business remain. The real fault is substituted for the fictitious fault of the negligence law.

Legal and not moral commands should be considered in dealing with the subject of fault.

Plaintiff-in-error says that *Rylands v. Fletcher*, cited on our original brief, has not been generally accepted as law in this country, citing *Actiesselskabet Ingrid v. Central R. of New Jersey*, 216 Fed. Rep. 72. That case says that *Rylands v. Fletcher* has been approved in Massachusetts and Ohio (p. 77) but not in New York, citing *Losee v. Buchanan*, 51 N. Y. 476, decided by the Commission of Appeals. We think, however, the principle of *Rylands v. Fletcher* was approved in the later case of *Sullivan v. Dunham*, 161 N. Y. 290, where one who for a lawful purpose and without negligence or want of skill exploded a blast of dynamite upon his own land and thereby caused a piece of wood to fall upon a person travelling upon the highway was held liable for the injury caused to such person.

RESULTS OF REVERSAL

If the Compensation Law is set aside, what is the result? The State of New York, by the vote of its people and the Legislature and by the unanimous concurrence of its courts, has during two and one-half years built up a system of compensation for accident cases applicable to its employees. One million eight hundred thousand workmen are covered by the act and 180,000 employers of the State have complied with the law and 112,000 awards have been made up to January 1st, including 2,100 death cases. These awards have either been paid

or are in process of being paid. The average value of compensation awards, exclusive of medical aid, is about \$160 and the medical aid is about \$11 for reportable accidents, and the total value of compensation, including medical aid is around twenty-five million dollars. Between 200 and 300 cases have been passed upon by the courts, in which the law has received construction and has become a working living vehicle for the redress of injuries.

Declaring the law unconstitutional would throw all this into confusion, like the throwing of shells in war into a fine cathedral. What would be done with the awards which have been paid or are in the process of being paid? What would be done with the causes of action which employees have lost through accepting compensation? Would the employers be entitled to refund of the insurance premiums which they have paid to insurance companies? The measure of confusion of subsequent litigation and of distress and hardship can hardly be over-estimated, and this confusion and distress will come with reference to a State policy in regard to its own workmen in which the nation at large is not interested.

Respectfully submitted,

EGBURT E. WOODBURY,

Attorney-General of the State of New York.

E. CLARENCE AIKEN,


HAROLD J. HINMAN,

Of Counsel.

FILED
NOV 29 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No.  280

SOUTHERN PACIFIC COMPANY

Plaintiff-in-Error

against

MARIE JENSEN

Defendant-in-Error

No.  281

CLYDE STEAMSHIP COMPANY

Plaintiff-in-Error

against

WILLIAM ALFRED WALKER

Defendant-in-Error

MOTION TO ADVANCE

BURLINGHAM, MONTGOMERY & BEECHER,

Attorneys for Plaintiffs-in-Error

ORMAN B. BEECHER,

AY ROOD ALLEN,

Of Counsel.



SUPREME COURT OF THE UNITED STATES

SOUTHERN PACIFIC COMPANY
Plaintiff-in-Error
against
MARIE JENSEN
Defendant-in-Error

OCTOBER TERM
1915
No. 700

CLYDE STEAMSHIP COMPANY
Plaintiff-in-Error
against
WILLIAM ALFRED WALKER
Defendant-in-Error

OCTOBER TERM
1915
No. 701

SIRS:

PLEASE TAKE NOTICE that a motion will be made at a Session of this Court to be held on the 29th day of November, 1915, at 12 o'clock, noon, or as soon thereafter as counsel can be heard, to advance these causes on the docket of this Court.

Dated, New York, November 15, 1915.

NORMAN B. BEECHER,
Attorney for Plaintiff-in-Error,
Office and P. O. Address,
27 William Street,
Borough of Manhattan,
City of New York, N. Y.

To

LAWRENCE K. BROWN, Esq.,
Attorney for Marie Jensen,
Defendant in-Error.

WILLIAM ALFRED WALKER,
Defendant in-Error.

EGBURT E. WOODBURY, Esq.,
Attorney-General of the State of New York.

JEREMIAH F. CONNOR, Esq.,
Counsel, State Industrial Commission.

SUPREME COURT OF THE UNITED STATES

SOUTHERN PACIFIC COMPANY
Plaintiff-in-Error

against

MARIE JENSEN
Defendant-in-Error

OCTOBER TERM
1915
No. 700

CLYDE STEAMSHIP COMPANY
Plaintiff-in Error

against

WILLIAM ALFRED WALKER
Defendant in Error

OCTOBER TERM
1915
No. 701

Now come Southern Pacific Company, plaintiff in-error, and Clyde Steamship Company, plaintiff in-error, and move this Court to advance these causes on the docket of this Court.

STATEMENT

These causes come here by writs of error to review decisions of the Court of Appeals of the State of New York. They involve the constitutionality of the Workmen's Compensation Law of the State of New York, present similar questions, and were argued together before the Court of Appeals.

By chapter 816 of the Laws of 1913, as reenacted by chapter 41 of the Laws of 1914, the Legislature of the State of New York enacted a compulsory Workmen's Compensation Law. The Law provided that claims for compensation should be heard by a Workmen's Compensation Commission, and provided that an appeal from the

decision and award of the Commission might be taken to the Courts.

In the Jensen case, one Christen Jensen while in the employ of the Southern Pacific Company was accidentally killed while working on its steamship *El Oriente*, then lying in navigable waters.

In the Walker case, the defendant-in-error received an accidental injury while working for the Clyde Steamship Company on its steamship *Cherokee* then lying in navigable waters.

Both employers and employees were at the time of the accidents engaged solely in interstate commerce.

Before the State Workmen's Compensation Commission the employers urged that the Workmen's Compensation Law, if applied in these cases, deprives the employers of property without due process of law, and that as the State of New York is without power to make the remedy given in the Workmen's Compensation Law exclusive of all other remedies in the case of employees injured on ship-board, the Law denies employers the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States. They also urged that the Law imposed a burden upon or regulation of interstate commerce in violation of Article 1, section 8, of the Constitution of the United States.

The Commission proceeded, however, to make awards of compensation, which awards were confirmed by the Appellate Division of the Supreme Court, Third Department, and the order of the Appellate Division was in turn affirmed by the Court of Appeals, both courts deciding against said claims of federal right urged by your petitioners.

These causes are now pending in this Court on writs of error allowed by the Chief Judge of the Court of Appeals of the State of New York.

REASONS FOR ADVANCEMENT

I.

The State of New York has established a Compensation Commission and an elaborate system for making compensation to employees for injuries received in their employments. Thousands of claims are now pending before the Commission in which forum practically all employees are asserting their claims. The State is expending large sums of money in administering the Law, and it is greatly to the public interest and the interest both of employers and employees that the constitutionality of the Law be passed upon by this Court as soon as may be.

II.

Numerous appeals have been taken from the decisions of the Compensation Commission, resulting in the staying of the Commission's awards. Most of these appeals will be determined by this Court's decision in these causes.

III.

Several other States of the United States have compulsory compensation laws similar in many respects to the New York Law. The constitutionality and application of those laws have been questioned in the courts and the decision of these causes will settle many questions raised in other states.

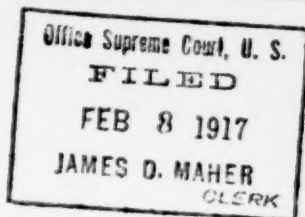
BURLINGHAM, MONTGOMERY & BEECHER,

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Of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

Nos. 280 and 281

SOUTHERN PACIFIC COMPANY,
Plaintiff-in-Error

AGAINST

MARIE JENSEN
Defendant-in-Error.

CLYDE STEAMSHIP COMPANY
Plaintiff-in-Error,

AGAINST

WILLIAM ALFRED WALKER,
Defendant-in-Error.

LIST OF ADDITIONAL AUTHORITIES FILED BY
PLAINTIFFS-IN-ERROR

Cases construing New York Workmen's Compensation
Law:

Heitz vs. Ruppert, 218 N. Y. 148;

Carbone vs. Loft, 219 N. Y. 37 (Memo.);

Moore vs. Lehigh Valley RR. Co., 169 N. Y. App.
Div. 177; *aff'd* without opinion 217 N. Y. 627;

Kiernan vs. Friestedt Underpinning Co., 171
App. Div. 539;
Hellmann vs. Manning Sand Paper Co., 162
Supp. 335 (N. Y. App. Div., Dec. 28, 19
yet officially reported);
Kobyra vs. Adams, 162 N. Y. Supp. 269 (N. Y.
Div., Dec. 28, 1916; not yet officially reported);
Putnam vs. Murray, 160 N. Y. Supp. 811 (N. Y.
Div.; not yet officially reported);
Miller vs. Taylor, 173 N. Y. App. Div. 865;
Plass vs. Central New England RR. Co., 16
App. Div. 826.

Finality of decision by Appellate Division:

Harnett vs. Steen Co., 216 N. Y. 101.
Sec. 23 of the New York Workmen's Compensation
Law (as amended by the Laws of 1916, Chapter 1000).

What law governs:

Rounsaville vs. Central RR. Co., 87 N. J. L. 314.
American Radiator Co. vs. Rogge, 86 N. J. L. 314.
aff'd on Opinion below, 87 N. J. L. 314.

Extraterritoriality; regulation of interstate commerce:

Western Union Telegraph Co. vs. Brown, 23
542, and cases therein cited.

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SOUTHERN PACIFIC COMPANY *v.* JENSEN.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD
JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 280. Argued February 28, 1916; restored to docket for reargument
November 13, 1916; reargued January 31, February 1, 1917.—Decided
May 21, 1917.

The Federal Employers' Liability Act applies only where the injury
occurs in railroad operations or their adjuncts, and cannot be ex-
tended to interstate maritime transportation merely because the
vessel in the case is owned and operated by an interstate carrier by
railroad.

The word "boats" in the statute refers to vessels which may be prop-

erly regarded as but part of a railroad's extension or equipment as understood and applied in common practice.

Under Art. III, § 2, of the Constitution, extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," and Art. I, § 8, conferring on Congress power to make all laws which may be necessary and proper for executing the powers vested in the general government or in any of its departments or officers, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.

In the absence of controlling statutes, the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.

The power of the States to change, modify or affect the general maritime law, while existing to some extent under the Constitution and the Judiciary Act of 1789, § 9, Judicial Code, §§ 24, 256, may not contravene the essential purposes of an act of Congress, work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.

Work performed by a stevedore on board a ship in unloading her at wharf in navigable waters is maritime; his employment for such work and injuries suffered in it are likewise maritime, and the rights and liabilities arising from such work, employment and injuries are clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbroke*, 234 U. S. 52.

A stevedore engaged on an interstate ship in unloading her at wharf in navigable waters in New York was accidentally injured and killed, and an award of compensation was made against the shipowner by the New York Workmen's Compensation Commission under the New York Workmen's Compensation Act (*New York Central R. R. Co. v. White*, 243 U. S. 188), and affirmed by the courts of that State. *Held*, that the act as applied to such a case was in conflict with the Constitution and to that extent invalid.

The remedy of the New York Workmen's Compensation Act (it provides compensation upon a prescribed scale for injuries and deaths of employees, without regard to fault, to be administered and awarded primarily through a state administrative commission), is a remedy unknown to the common law and incapable of enforcement by the ordinary processes of any court, and hence is not among the common-law remedies which are saved to suitors from the exclusive admiralty jurisdiction by Judiciary Act of 1789, § 9; Judicial Code, §§ 24, 256.

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The remedy of the New York Workmen's Compensation Act is inconsistent with the policy of Congress to encourage investments in ships, manifested by the Acts of 1851 and 1884 (Rev. Stats., §§ 4283-4285; c. 121, 23 Stat. 57), which declare a limitation upon the liability of their owners.

215 N. Y. 514, reversed.

THE case is stated in the opinion.

Mr. Norman B. Beecher, with whom *Mr. Ray Rood Allen* was on the briefs, for plaintiff in error.

Mr. E. Clarence Aiken, with whom *Mr. Egburt E. Woodbury*, Attorney General of the State of New York, and *Mr. Harold J. Hinman* were on the briefs, for defendant in error.

Mr. Christopher M. Bradley, by leave of court, filed a brief on behalf of the Industrial Accident Commission of the State of California, as *amicus curiæ*.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Upon a claim regularly presented, the Workmen's Compensation Commission of New York made the following findings of fact, rulings and award, October 9, 1914:

"1. Christen Jensen, the deceased workman, was, on August 15, 1914, an employee of the Southern Pacific Company, a corporation of the State of Kentucky, where it has its principal office. It also has an office at Pier 49, North River, New York City. The Southern Pacific Company at said time was, and still is, a common carrier by railroad. It also owned and operated a steamship *El Oriente*, plying between the ports of New York and Galveston, Texas.

"2. On August 15, 1914, said steamship was berthed

for discharging and loading at Pier 49, North River, lying in navigable waters of the United States.

"3. On said date Christen Jensen was operating a small electric freight truck. His work consisted in driving the truck into the steamship *El Oriente* where it was loaded with cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with Pier 49, North River, and thence upon the pier, where the lumber was unloaded from the truck. The ship was about 10 feet distant from the pier. At about 10:15 A. M., after Jensen had been doing such work for about three hours that morning, he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship *El Oriente*, which was being transported from Galveston, Texas, to New York City. Jensen stood on the rear of the truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken and in this manner he met his death.

"4. The business of the Southern Pacific Company in this State consisted at the time of the accident and now consists solely in carrying passengers and merchandise between New York and other States. Jensen's work consisted solely in moving cargo destined to and from other States.

"5. Jensen left him surviving Marie Jensen, his widow, 29 years of age, and Howard Jensen, his son, seven years of age, and Evelyn Jensen, his daughter, three years of age.

"6. Jensen's average weekly wage was \$19.60 per week.

"7. The injury was an accidental injury and arose out of

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and in the course of Jensen's employment by the Southern Pacific Company and his death was due to such injury. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another."

"This claim comes within the meaning of Chapter 67 of the Consolidated Laws as re-enacted and amended by Chapter 41 of the Laws of 1914, and as amended by Chapter 316 of the Laws of 1914."

"Award of compensation is hereby made to Marie Jensen, widow of the deceased, at the rate of \$5.87 weekly during her widowhood with two years' compensation in one sum in case of her remarriage; to Harold Jensen, son of the deceased, at the rate of \$1.96 per week and to Evelyn Jensen, daughter of the deceased, at the rate of \$1.96 per week until the said Harold Jensen and Evelyn Jensen respectively shall arrive at the age of eighteen years, and there is further allowed the sum of One Hundred (\$100) Dollars for funeral expenses."

In due time the Southern Pacific Company objected to the award "upon the grounds that the Act does not apply because the workman was engaged in interstate commerce on board a vessel of a foreign corporation of the State of Kentucky which was engaged solely in interstate commerce; that the injury was one with respect to which Congress may establish, and has established, a rule of liability, and under the language of Section 114,¹ [copied

¹ Section 114. "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the

in the margin] the Act has no application; on the ground that the Act includes only those engaged in the operation of vessels other than those of other states and countries in foreign and interstate commerce, while the work upon which the deceased workman was engaged at the time of his death was part of the operation of a vessel of another state engaged in interstate commerce, and hence does not come within the provisions of the Act; further, that the Act is unconstitutional, as it constitutes a regulation of and burden upon commerce among the several States in violation of Article I, Section 8, of the Constitution of the United States; in that it takes property without due process of law in violation of the 14th Amendment of the Constitution; in that it denies the Southern Pacific Company the equal protection of the laws in violation of the 14th Amendment of the Constitution because the Act does not afford an exclusive remedy, but leaves the employer and its vessels subject to suit in admiralty; also that the Act is unconstitutional in that it violates Article III, Section 2, of the Constitution conferring admiralty jurisdiction upon the courts of the United States."

Without opinion, the Appellate Division approved the award and the Court of Appeals affirmed this action (215 N. Y. 514, 519), holding that the Workmen's Compensation Act applied to the employment in question and was not obnoxious to the Federal Constitution. It said: "The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums

manner provided by the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

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paid by employers based on the payroll, the number of employees and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the commission of his own financial ability to pay. If he does neither he is liable to a penalty equal to the *pro rata* premium payable to the state fund during the period of his non-compliance and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk and negligence of a fellow-servant. By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or results solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits but in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power. Thus the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risk involved." See also *Walker v. Clyde Steamship Co.*, 215 N. Y. 529.

In *New York Central R. R. Co. v. White*, 243 U. S. 188, we held the statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First. Plaintiff in error being an interstate common

carrier by railroad is responsible for injuries received by employees while engaged therein under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and no state statute can impose any other or different liability. Second. As here applied, the Workmen's Compensation Act conflicts with the general maritime law, which constitutes an integral part of the federal law under Art. III, § 2, of the Constitution, and to that extent is invalid.

The Southern Pacific Company, a Kentucky Corporation, owns and operates a railroad as a common carrier; also the steamship *El Oriente* plying between New York and Galveston, Texas. The claim is that therefore rights and liabilities of the parties here must be determined in accordance with the Federal Employers' Liability Act. But we think that act is not applicable in the circumstances.

The first Federal Employers' Liability Act (June 11, 1906, c. 3073, 34 Stat. 232) extended in terms to all common carriers engaged in interstate or foreign commerce, and because it embraced subjects not within the constitutional authority of Congress was declared invalid. *The Employers' Liability Cases*, 207 U. S. 463, January 6, 1908. The later act is carefully limited and provides that "every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories, or between the District of Columbia or any of the States and Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's

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parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word "boats" in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice.

The fundamental purpose of the Compensation Law as declared by the Court of Appeals is "the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments," among them being "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." Its general provisions are specified in our opinion in *New York Central R. R. Co. v. White*, *supra*, and need not be repeated. Under the construction adopted by the state courts no ship may load or discharge her

cargo at a dock therein without incurring a penalty, unless her owners comply with the act which, in order to secure payment of compensation for accidents, generally without regard to fault and based upon annual wages, provides (§ 50) that—"An employer shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the state fund, or—2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance.—3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter."

"If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission."

Article III, § 2, of the Constitution, extends the judicial power of the United States "To all cases of admiralty and maritime jurisdiction;" and Article I, § 8, confers upon the Congress power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Con-

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stitution in the government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14. And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna*, 21 Wall. 558; *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 557; *Workman v. New York City*, 179 U. S. 552.

In *The Lottawanna*, Mr. Justice Bradley speaking for the court said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

By § 9, Judiciary Act of 1789, 1 Stat. 76, 77, the District Courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and

maritime jurisdiction; . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." And this grant has been continued. Judicial Code, §§ 24 and 256.

In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, *The Lottawanna*, 21 Wall. 558, 579, 580; *The J. E. Rumbell*, 148 U. S. 1; pilotage fees fixed, *Cooley v. Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236, 242; and the right given to recover in death cases, *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95, 138. See *The City of Norwalk*, 55 Fed. Rep. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty, *The Moses Taylor*, 4 Wall. 411; *Steamboat Co. v. Chase*, 16 Wall. 522, 534; *The Glide*, 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, *The Roanoke*, 189 U. S. 185. See *Workman v. New York City*, 179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*.

A similar rule in respect to interstate commerce deduced

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from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can also act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 507, 508; *Vance v. Vandercook Co.*, 170 U. S. 438, 444; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311. And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.

The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60.

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed.

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So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction. *The Hine v. Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Co. v. Chase*, 16 Wall. 522, 531, 533; *The Glide*, 167 U. S. 606, 623. And finally this remedy is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (Rev. Stats., §§ 4283-4285; § 18, Act of June 26, 1884, c. 121, 23 Stat. 57) which declare a limitation upon the liability of their owners. *Richardson v. Harmon*, 222 U. S. 96, 104.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HOLMES, dissenting.

The Southern Pacific Company has been held liable under the statutes of New York for an accidental injury happening upon a gang-plank between a pier and the company's vessel and causing the death of one of its employees. The company not having insured as permitted, the statute may be taken as if it simply imposed a limited but absolute liability in such a case. The short question is whether the power of the State to regulate the liability in that place and to enforce it in the State's own courts is taken away by the conferring of exclusive jurisdiction

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of all civil causes of admiralty and maritime jurisdiction upon the courts of the United States.

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the state courts, and leaves some power of legislation at least, to the States. For the latter I need do no more than refer to state pilotage statutes, and to liens created by state laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the state courts, although the death was due to a collision upon the high seas. *Steamboat Co. v. Chase*, 16 Wall. 522. *Sherlock v. Alling*, 93 U. S. 99, 104. *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 646. *Minnesota Rate Cases*, 230 U. S. 352, 409. The misgivings of Mr. Justice Bradley were adverted to in *The Hamilton*, 207 U. S. 398, and held at least insufficient to prevent the admiralty from recognizing such a state-created right in a proper case, if indeed they went to any such extent. *La Bourgogne*, 210 U. S. 95, 138.

The statute having been upheld in other respects, *New York Central R. R. Co. v. White*, 243 U. S. 188, I should have thought these authorities conclusive. The liability created by the New York act ends in a money judgment, and the mode in which the amount is ascertained, or is to be paid, being one that the State constitutionally might adopt, cannot matter to the question before us if any liability can be imposed that was not known to the maritime law. And as such a liability can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault. Neither can the statutes limiting the liability of owners affect the case. Those statutes extend to non-maritime torts, which of course are the creation of state law. *Richardson v. Harmon*, 222 U. S.

96, 104. They are paramount to but not inconsistent with the new cause of action. However, as my opinion stands on grounds that equally would support a judgment for a maritime tort not ending in death, with which admiralty courts have begun to deal, I will state the reasons that satisfy my mind.

No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced it is because the State had constitutional power to pass the law. Taking it as established that a State has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. *The Osceola*, 189 U. S. 158, 175. One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master and to apply the common-law principles of tort.

Now, however, common-law principles have been applied to sustain a libel by a stevedore *in personam* against the master for personal injuries suffered while loading a ship, *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52; and *The Osceola* recognizes that in some cases at

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least seamen may have similar relief. From what source do these new rights come? The earliest case relies upon "the analogies of the municipal law," *The Edith Godden*, 23 Fed. Rep. 43, 46,—sufficient evidence of the obvious pattern, but inadequate for the specific origin. I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*. Certainly he could not in that way enlarge the exclusive jurisdiction of the District Courts and cut down the power of the States. If admiralty adopts common-law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State. The only authority available is the common law or statutes of a State. For from the often repeated statement that there is no common law of the United States, *Wheaton v. Peters*, 8 Pet. 591, 658; *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 101, and from the principles recognized in *Atlantic Transport Co. v. Imbroke* having been unknown to the maritime law, the natural inference is that in the silence of Congress this court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the State. *Sherlock v. Alling*, 93 U. S. 99, 104. *Taylor v. Carryl*, 20 How. 583, 598. So far as I know, the state courts have made this assumption without criticism or attempt at revision from the beginning to this day; e. g. *Wilson v. MacKenzie*, 7 Hill (N. Y.), 95. *Gabrielson v. Waydell*, 135 N. Y. 1, 11.

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Kalleck v. Deering, 161 Massachusetts, 469. See *Ogle v. Barnes*, 8 T. R. 188. *Nicholson v. Mounsey*, 15 East, 384. Even where the admiralty has unquestioned jurisdiction the common law may have concurrent authority and the state courts concurrent power. *Schoonmaker v. Gilmore*, 102 U. S. 118. The invalidity of state attempts to create a remedy for maritime contracts or torts, parallel to that in the admiralty, that was established in such cases as *The Moses Taylor*, 4 Wall. 411, and *The Hine v. Trevor*, 4 Wall. 555, is immaterial to the present point.

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some State, and if the District Courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin and deriving its authority in that territory only from some particular State of this Union also governs maritime torts in that territory—and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes. On the other hand the refusal of the District Courts to give remedies coextensive with the common law would prove no more than that they regarded their jurisdiction as limited by the ancient lines—not that they doubted that the common law might and would be enforced in the courts of the States as it always has been. This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common-law or admiralty court. Compare *The Max Morris*, 137 U. S. 1, with *Belden v. Chase*, 150 U. S. 674, 691. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman v. New York City*, 179 U. S. 552, the state law, common or statute,

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would prevail in the courts of the State. Happily such conflicts are few.

It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i. e., in the state courts, did not import a like if subordinate power in the States. But leaving that question on one side, such cases as *Steamboat Co. v. Chase*, 16 Wall. 522, *The Hamilton*, 207 U. S. 398, and *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, show that it is too late to say that the mere silence of Congress excludes the statute or common law of a State from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect.

As to the spectre of a lack of uniformity I content myself with referring to *The Hamilton*, 207 U. S. 398, 406. The difficulty really is not so great as in the case of interstate carriers by land, which "in the absence of Federal statute providing a different rule are answerable according to the law of the State for nonfeasance or misfeasance within its limits." *The Minnesota Rate Cases*, 230 U. S. 352, 408, and cases cited. The conclusion that I reach accords with the considered cases of *Lindstrom v. Mutual Steamship Co.*, 132 Minnesota, 328; *Kennerson v. Thames Towboat Co.*, 89 Connecticut, 367; and *North Pacific S. S. Co. v. Industrial Accident Commission of California*, 163 Pac. Rep. 199, as well as with the New York decision in this case. 215 N. Y. 514.

MR. JUSTICE PITNEY, dissenting.

While concurring substantially in the dissenting opinion of Mr. Justice Holmes, I deem it proper, in view of the momentous consequences of the decision, to present some additional considerations.

This dissent is confined to that part of the prevailing opinion which holds that the Workmen's Compensation Act of New York, as applied by the state court to a fatal injury sustained by a stevedore while engaged in work of a maritime nature upon navigable water within that State, conflicts with the Constitution of the United States and the act of Congress conferring admiralty and maritime jurisdiction in civil cases upon the district courts of the United States, and is to that extent invalid. Except for the statute, an action might have been brought in a court of admiralty. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 62. No question is raised respecting the jurisdiction of the state court over the subject matter. But plaintiff in error contends, and the prevailing opinion holds, that it was a violation of a federal right for the state court to apply the provisions of the local statute to a cause of action of maritime origin, because, by the Constitution of the United States, admiralty jurisdiction was conferred upon the federal courts.

It should be stated, at the outset, that the case involves no question of penalties imposed by the New York act, but affects solely the responsibility of the employer to make compensation to the widow, in accordance with its provisions, which are outlined in *New York Central R. R. Co. v. White*, 243 U. S. 188, 192-195.

The argument is that even in the absence of any act of Congress prescribing the responsibility of a shipowner to his stevedore, the general maritime law, as accepted by the federal courts when acting in the exercise of their admiralty jurisdiction, must be adopted as the rule of decision by state courts of common law when passing upon any case that might have been brought in the admiralty; and that just as the absence of an act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so non-action by Congress amounts to an im-

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perative limitation upon the power of the States to interpose where maritime matters are involved.

This view is so entirely unsupported by precedent, and will have such novel and far-reaching consequences, that it ought not to be accepted without the most thorough consideration.

Section 2 of Article III of the Constitution reads as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Acting under the authority of Article I, § 8, which empowers Congress to make all laws necessary and proper for carrying into execution the powers vested in the Government or in any department or officer thereof, the First Congress, in the original Judiciary Act (Act of September 24, 1789, c. 20, § 9, 1 Stat. 73, 77), conferred upon the federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The saving clause has been preserved in all subsequent revisions. Rev. Stats., § 563 (8); Jud. Code, § 24, (3), 36 Stat. 1087, 1091, c. 231.

From the language quoted from the Constitution, read in the light of the general purpose of that instrument and the contemporaneous construction found in the Judiciary Act, with regard also to the mischiefs that called for the

establishment of a national judiciary, and from what I believe to be the unbroken current of decisions in this court from that day until the present, I draw the following conclusions: (1) That the framers of the Constitution intended *to establish jurisdiction*—the power to hear and determine controversies of the various classes specified—and *not to prescribe particular codes or systems of law* for the decision of those controversies; (2) That the civil jurisdiction in admiralty was not intended to be exclusive of the courts of common law, at least not until Congress should deem it proper so to enact; (3) That by the law of England, and by the practice of the colonial governments, the courts of common law, of equity, and of admiralty, were controlled in their decisions by separate and in a sense independent systems of substantive law, and the constitutional grant of judicial power in “all cases in law and equity,” and in “all cases of admiralty and maritime jurisdiction,” was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the federal courts of common law when exercising their concurrent jurisdiction, than to make the rules of the common law binding upon the courts of admiralty; (4) That if not binding upon the federal courts, it results, *a fortiori*, that the rules of maritime law were not intended to be made binding upon the courts of the States; (5) That it is not necessary, in order to give full effect to the grant of admiralty and maritime jurisdiction, to imply that the rules of decision prevailing in admiralty must be binding upon common-law courts exercising concurrent jurisdiction in civil causes of maritime origin, and to give such a construction to the Constitution is to render unconstitutional the saving clause in § 9 of the Judiciary Act, and also to trench upon the proper powers of the States by interfering with their control over their water-borne internal commerce; and (6) That, in the absence of legislation by Congress abrogating the saving

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clause, the States are at liberty to administer their own laws in their own courts when exercising a jurisdiction concurrent with that of admiralty, and at liberty to change those laws by statute.

That the language of § 2 of Art. III of the Constitution speaks only of establishing jurisdiction, and does not prescribe the mode in which or the substantive law by which the exercise of that jurisdiction is to be governed, seems to me entirely plain; and upon this point I need only refer to the language itself, which I have quoted.

That this view is in harmony with the general purpose of the Constitution seems to me equally plain. At this late date it ought not to be necessary to repeat that the object of the framers of that instrument was to lay the foundations of a government, to set up its frame-work, and to establish merely the general principles by which it was to be animated; avoiding, as far as possible, any but the most fundamental regulations for controlling its operations, and these usually in the form of restrictions. *Vanhorne v. Dorrance*, 2 Dall. 304, 308; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326.

The object was to enumerate, rather than to define, the powers granted. *Gibbons v. Ogden*, 9 Wheat. 1, 189, 194; *Passenger Cases*, 7 How. 283, 549; *Lottery Case*, 188 U. S. 321, 346. To delineate only the great outlines of the judicial power, leaving the details to Congress, while providing for the organization of the legislative department and the mode in which and the restrictions under which its authority should be exercised. *Rhode Island v. Massachusetts*, 12 Pet. 657, 721. The reason for adopting general outlines only was well expressed by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 407: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could

scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language."

The adoption of any particular system of substantive law was not within the purpose of the Constitutional Convention; and the clause establishing the judicial power was ill-adapted to the purpose had it existed. So far as they intended to prescribe permanent rules of substantive or even procedural law in connection with the establishment of the judicial system, the framers employed express terms for the purpose, as appears from other provisions of Article III, including the definition of treason, the character of proof required, the limitation of the punishment, and the requirement of a jury trial for this and other crimes.

In a somewhat exhaustive examination of various sources of information, including Elliot's Debates, Farland's Records of the Federal Convention, and *The Federalist*, Nos. 80-83, I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either federal or state.

Certainly, there is nothing in the mere provision establishing jurisdiction in admiralty and maritime causes to have that effect, unless the jurisdiction so established was in its nature exclusive. But, in civil causes, the jurisdic-

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tion was not exclusive by the law of England and of the Colonies, and it was not made an exclusive jurisdiction by the Constitution.

In discussing this point, the distinction between the instance court and the prize court of admiralty must be observed. It was held in England that the question of prize or no prize, and other questions arising out of it, were exclusively cognizable in the admiralty, because that court took jurisdiction owing to the fact of possession of a prize of war, and the controversy turned upon belligerent rights and was determinable by the law of nations, and not the particular municipal law of any country. *Le Caux v. Eden* (1781), Doug. 594; 99 E. R. 375, 379-385; *Lindo v. Rodney*, reported in a note to *Le Caux v. Eden*, Doug. 613; 99 E. R. 385; *Smart v. Wolff* (1789), 3 T. R. 323, 340, *et seq.*; *Lord Camden v. Home* (1791), 4 T. R. 382, 393 *et seq.* But of civil actions *in personam* the instance court exercised a jurisdiction concurrent with that of the courts of common law. As Lord Mansfield said in *Lindo v. Rodney*, Doug. 614: "A thing being done upon the high sea don't exclude the jurisdiction of the courts of common law. For seizing, stopping, or taking a ship, upon the high sea, *not as prize*, an action will lie; but for taking as *prize*, no action will lie. The nature of the question excludes; not the locality." And again, referring to the effect of certain statutes (p. 614a): "The taking a ship upon the high sea is triable at law to repair the plaintiff in damages; but a taking on the high sea as *prize* is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—*prize or no prize*—not only authorizes the prize court, but excludes the common law. These statutes don't exclude the common law in any case, and they confine the Admiralty by the locality of the thing done, which is the cause of action. It must be done upon the high sea."

So, with respect to actions *ex contractu*, Mr. Justice

Blackstone says, 3 Black. Com. 107: "It is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall." The concurrent jurisdiction of the courts of common law was affirmed by Dr. Browne, the first edition of whose work was published in 1797-1799. 2 Browne's Civ. & Adm. Law (1st Am. ed.), 112, 115.

The declaration of Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 390, that the lodging by the Constitution of the entire admiralty power in the federal judiciary, and the ninth section of the Judiciary Act, with its saving of common-law remedies, left the concurrent power of the courts of common law and of admiralty where it stood at common law, was not a chance remark. It has been so ruled in many other cases, to which I shall refer hereafter. The principles and history of the common law were well known to the framers of the Constitution and the members of the First Congress; it was from that system that their terminology was derived; and the provisions of the Constitution and contemporaneous legislation must be interpreted accordingly.

The statement that there is no common law of the United States (*Wheaton v. Peters*, 8 Pet. 591, 658; *Smith v. Alabama*, 124 U. S. 465, 478) is true only in the sense that the Constitution neither of its own force imposed, nor authorized Congress to impose, the common law or any other general body of laws upon the several States for the regulation of their internal affairs. As was pointed out in *Smith v. Alabama* (p. 478), "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the Eng-

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lish common law, and are to be read in the light of its history."

As was well expressed by Shiras, District Judge, in *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. Rep. 24, 31: "From them [citations of the decisions of this court] it appears, beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the Constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the Colonies or States, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected. The problem sought to be solved was not whether the Constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and state governments."

And it is not to be supposed that the framers of the Constitution, familiar with the institutions and the principles of the common law, by which the admiralty jurisdiction was allowed on sufferance, and with a degree of jealousy born of the fact that the courts of admiralty were not courts of record, that they followed the practice of the civil law, allowed no trial by jury, and administered an exotic system of laws (3 Black. Com. 69, 86, 87, 106-108)—it is not to be supposed, I say, that the framers of the

Constitution, in granting judicial power over cases of admiralty and maritime jurisdiction, along with like power over all cases in law and equity arising under the laws of the United States, intended to exclude common-law courts, state or national, from any part of their concurrent jurisdiction in cases of maritime origin, or to deprive them of the judicial power, theretofore existing, to decide such cases according to the rules of the common law.

It is matter of familiar history that one of the chief weaknesses of the Confederation was in the absence of a judicial establishment possessed of general authority. Except that the Continental Congress, as an incident of the war power, was authorized to establish rules respecting captures and the disposition of prizes of war and to appoint courts for the trial of piracies and felonies committed on the high sea, and for determining appeals in cases of capture, and except that the Congress itself, through commissioners, was to exercise jurisdiction in disputes between the States and in controversies respecting conflicting land grants of different States, there was no provision in the Articles of Confederation for establishing a judicial system under the authority of the general government.

The result was that not only private parties, in cases arising out of the laws of the Congress, but the United States themselves, were obliged to resort to the courts of the States for the enforcement of their rights. Many cases of this character are reported, some even antedating the Confederation. *Respublica v. Sweers* (1779), 1 Dall. 41; *Respublica v. Powell* (1789), 1 Dall. 47; *Respublica v. De Longchamps* (1784), 1 Dall. 111. Even treason was punished in state courts and under state laws. See cases of *Molder*, *Malin*, *Carlisle* and *Roberts* (1778), 1 Dall. 33-39.

Before the Revolution, courts of admiralty jurisdiction were a part of the judicial systems of the several Colonies.

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Waring v. Clarke, 5 How. 441, 454-456; Benedict on Admiralty, §§ 118-165. Upon the outbreak of the War questions of prize law became acute, and the colonial Congress, by resolutions of November 25, 1775, passed in the exercise of the war power (3 Dall. 54, 80) made appropriate recommendations for the treatment of prizes of war, but remitted the jurisdiction over such questions to the courts of the several Colonies, reserving to itself only appellate authority. This system continued until the year 1780 (after the submission of the Articles of Confederation, but before their final ratification), when the Congress established a court for the hearing of appeals from the state courts of admiralty in cases of capture. The opinions of this court are reported in 2 Dall. 1-42, and numerous cases decided without opinion, as well as some of those decided by committees of the Congress prior to the establishment of the court, are referred to in the late Bancroft Davis' "Federal Courts Before the Constitution," 131 U. S., Appendix, xix-xlix. The weak point of this system was the want of power in the central government to enforce the judgment of the appellate tribunal when it chanced to reverse the decree of a state court. There were some curious cases of conflicting jurisdiction, illustrated by *Doane v. Penhallow* (1787), 1 Dall. 218, 221; *Penhallow v. Doane* (1795), 3 Dall. 54, 79, 86; and *United States v. Peters* (1809), 5 Cranch, 115, 135, 137.

It was under the influence of numerous experiences of the inefficiency of a general government unendowed with judicial authority that the Constitutional Convention assembled in the year 1787. The fundamental need, to which the Convention addressed itself in framing the judiciary article, was to set up a judicial power covering all subjects of national concern. There was no greater need to establish jurisdiction over admiralty and maritime causes than over controversies arising under the Constitution and laws of the Union. There was no purpose to

establish a system of substantive law in any of the several classes of cases included within the grant of judicial power. The language employed makes it plain that, with the few express exceptions already noted (treason, etc.), the rules of decision were to be sought elsewhere. The entire absence of a purpose to establish a maritime code is manifest not only from the omission of any reference to the laws of Oleron, the laws of Wisbuy, or any other of the maritime codes recognized by the nations of Europe, but further from the fact that the Colonies differed among themselves as to maritime law and admiralty practice, and that their system in general differed from that which was administered in England. The evident purpose, in this as in the other classes of controversy, was that the courts of admiralty should administer justice according to the previous course and practice of such courts in the Colonies, just as the courts of common-law and equity jurisdiction were to proceed according to the several systems of substantive law appropriate to courts of their respective kinds; subject, of course, to the power of Congress to change the rules of law respecting matters lying within its appropriate sphere of action.

Undoubtedly the framers of the Constitution were advised of the ancient controversy in England between the common-law courts and the courts of admiralty respecting the extent of the jurisdiction of the latter. They were aware of the dual function of the admiralty courts as courts of instance and as prize courts, and of the established rule that in civil causes the jurisdiction of the instance court was concurrent with that of the courts of common law. They must have known that, whatever question had existed as to the territorial limits of the jurisdiction of the admiralty, it never had been questioned that in suits for mariners' wages and suits upon policies of marine insurance, and in other actions *ex contractu* having a maritime character, and also in actions of tort

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arising upon the sea, the courts of common law exercised, and long had exercised, concurrent jurisdiction. Whatever early doubts may have existed had been based not upon any inherent incapacity of the common-law courts to deal with the subject matters, but upon the ancient theory of the venue, and disappeared with the recognition of the fictitious venue.

The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that before the Constitution were subject to the concurrent jurisdiction of the courts of admiralty and the common-law courts. The First Congress did not so construe it, as the saving clause in the Judiciary Act conclusively shows. And, assuming that the States, in the absence of legislation by Congress, would be without power over the subject matter, this saving clause, still maintained upon the statute book, is a sufficient grant of power. Jurisdiction in prize cases, as has been shown, springs out of the possession of a prize of war. Civil proceedings *in rem*, to be mentioned hereafter, are based upon the maritime lien, where possession in the claimant is neither necessary nor usual as is the case with common-law liens. With these exceptions, both resting upon grounds peculiar to the forum of the admiralty, concurrent jurisdiction of the courts of common law in civil cases of maritime origin always has been recognized by this court. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 390; *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 458; *The Belfast*, 7 Wall. 624, 644-645; *Insurance Co. v. Dunham*, 11 Wall. 1, 32; *Leon v. Galceran*, 11 Wall. 185, 187-188; *Steamboat Co. v. Chase*, 16 Wall. 522, 533; *Schoonmaker v. Gilmore*, 102 U. S. 118; *Manchester v. Massachusetts*, 139 U. S. 240, 262.

Nor is the reservation of a common-law remedy limited to such causes of action as were known to the common law

at the time of the passage of the Judiciary Act. It includes statutory changes. *Steamboat Co. v. Chase*, 16 Wall. 522, 533, 534; *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 644. Those remedies which were held not to be common-law remedies, within the saving clause, in *The Moses Taylor*, 4 Wall. 411, 427, 431; *The Hine v. Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Co. v. Chase*, 16 Wall. 522, 533, and *The Glide*, 167 U. S. 606, 623, provided for imposing a lien on the ship by proceedings in the nature of admiralty process *in rem*, and it was for this reason only that they were held to trench upon the exclusive admiralty jurisdiction of the courts of the United States. The distinction was noticed in *Leon v. Galceran*, 11 Wall. 185, 189, and again in *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 642. In the latter case it was pointed out (p. 644) that the reservation of a common-law remedy where the common law is competent to give it was not confined to common-law actions but included remedies without action, such as a distress for rent or for the trespass of cattle; a bailee's remedy by detaining personal property until paid for work done upon it or for expenses incurred in keeping it; the lien of an innkeeper upon the goods of his guests, and that of a carrier upon things carried; the remedy of a nuisance by abatement, and others. The most recent definition of the rule laid down in *The Hine v. Trevor* and other cases of that class is in *Rounds v. Cloverport Foundry & Machine Co.*, 237 U. S. 303.

I have endeavored to show, from a consideration of the phraseology of the constitutional grant of jurisdiction and the act of the First Congress passed to give effect to it, from the history in the light of which the language of those instruments is to be interpreted, and from the uniform course of decision in this court from the earliest time until the present, these propositions: First, that the grant of jurisdiction to the admiralty was not intended to be ex-

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clusive of the concurrent jurisdiction of the common-law courts theretofore recognized; and, secondly, that neither the Constitution nor the Judiciary Act was intended to prescribe a system of substantive law to govern the several courts in the exercise of their jurisdiction, much less to make the rules of decision, prevalent in any one court, obligatory upon others, exercising a distinct jurisdiction, or binding upon the courts of the States when acting within the bounds of their respective jurisdictions. In fact, while courts of admiralty undoubtedly were expected to administer justice according to the law of nations and the customs of the sea, they were left at liberty to lay hold of common-law principles where these were suitable to their purpose, and even of applicable state statutes, just as courts of common law were at liberty to adopt the rules of maritime law as guides in the proper performance of their duties. This eclectic method had been practiced by the courts of each jurisdiction prior to the Constitution, and there is nothing in that instrument to constrain them to abandon it.

The decisions of this court show that the courts of admiralty in many matters are bound by local law. The doubt expressed by Mr. Justice Bradley in *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 558, as to whether a state law could have force to create a liability in a maritime case at all, was laid aside in *The Corsair*, 145 U. S. 335, and definitely set at rest in *The Hamilton*, 207 U. S. 398, 404. The fact is that, long before *Butler v. Boston & Savannah Steamship Co.*, it had been recognized that state laws might not merely create a liability in a maritime case, but impose a duty upon the admiralty courts of the United States to enforce such liability. Thus, while it was recognized that by the general maritime law a foreign ship, or a ship in a port of a State to which she did not belong, was subject to a suit *in rem* in the admiralty for repairs or necessities, the case of a ship in a

port of her home State was governed by the municipal law of the State, and no lien for repairs or necessities would be implied unless recognized by that law. *The General Smith* (1819), 4 Wheat. 438, 443; *The Lottawanna*, 21 Wall. 558, 571, 578. Conversely, it was held in the case of *The Planter* (*Peyroux v. Howard*, 1833), 7 Pet. 324, 341, that a libel *in rem* in the admiralty might be maintained against a vessel for repairs done in her home port where a local statute gave a lien in such a case. To the same effect, *The J. E. Rumbell*, 148 U. S. 1, 12. As elsewhere pointed out herein, where a state statute conferred a lien operative strictly *in rem*, it was uniformly held not enforceable in the state courts, but only because it trenched upon the peculiar jurisdiction of the admiralty, and therefore was not a "common-law remedy" within the saving clause of the Judiciary Act of 1789. *The Moses Taylor*, 4 Wall. 411, 427, 431; *The Hine* & *Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Co. v. Chase*, 16 Wall. 522, 533; *The Glide*, 167 U. S. 606, 623.

Under these decisions, and others to the same effect, the substance of the matter is that a State may, by statute, create a right to a lien upon a domestic vessel, in the nature of a maritime lien, which may be enforced in admiralty in the courts of the United States; but a State may not confer upon its own courts jurisdiction to enforce such a lien, because the federal jurisdiction in admiralty is exclusive. *The J. E. Rumbell*, 148 U. S. 1, 12, and cases cited. But a lien imposed not upon the *rem* but upon defendant's interest in the *res* may be made enforceable in the state courts. *Rounds v. Cloverport Foundry & Machine Co.*, 237 U. S. 303, 307, and cases cited.

The Roanoke, 189 U. S. 185, 194, 198, while approving *The General Smith*, *The Planter*, *The Lottawanna*, and *The J. E. Rumbell*, *supra*, gave a negative answer to the very different question whether a State could, without encroaching upon the federal jurisdiction, create a lien

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against foreign vessels to be enforced in the courts of the United States.

In the present case there is no question of lien, and, I repeat, no question concerning the jurisdiction of the state court; the crucial inquiry is, to what law was it bound to conform in rendering its decision? Or, rather, the question is the narrower one: Do the Constitution and laws of the United States prevent a state court of common law from applying the state statutes in an action *in personam* arising upon navigable water within the State, there being no act of Congress applicable to the controversy? I confess that until this case and kindred cases submitted at the same time were brought here, I never had supposed that it was open to the least doubt that the reservation to suitors of the right of a common-law remedy had the effect of reserving at the same time the right to have their common-law actions determined according to the rules of the common law, or state statutes modifying those rules. This court repeatedly has so declared, at the same time recognizing fully that the point involves the question of state power. In *United States v. Bevans*, 3 Wheat. 336, 388, the court, by Mr. Chief Justice Marshall, said: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. . . . In describing the judicial power, the framers of our Constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving

the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of the sovereignty not yet given away." In *Steamboat Co. v. Chase*, *supra*, the court, by Mr. Justice Clifford, said (p. 534): "State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the Circuit Courts as well as in the State courts."

In *Atlee v. Packet Co.*, 21 Wall. 389, 395, 396, the court, by Mr. Justice Miller, said: "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. . . . An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. . . . Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially." And see *The Max Morris*, 137 U. S. 1, 10; *Belden v. Chase*, 150 U. S. 674, 691; *Benedict Adm.*, § 201.

In the prevailing opinion, great stress is laid upon certain expressions quoted from *The Lottawanna*, 21 Wall. 558, 574, but it seems to me they have been misunderstood, because read without regard to context and subject matter. That was an admiralty appeal, and involved the question whether by the general maritime law, as accepted in the United States, there was an implied lien for necessities

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furnished to a vessel in her home port, where no such lien was recognized by the municipal law of the State. In the course of the discussion, the court, by Mr. Justice Bradley, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? *The Constitution does not define it.* It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. *Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary.* It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' *without defining those terms, assuming them to be known and understood.*"

In this language there is the clearest recognition that the Constitution, in establishing and distributing the judicial power, did not intend to define substantive law, or to make the rules of decision in one jurisdiction binding *proprio vigore* in tribunals exercising another jurisdiction. The courts of common law were to administer justice according to the common law, the courts of equity according to the principles of equity, and the courts of admiralty and maritime jurisdiction according to the maritime law.

The expression on page 575 respecting the uniform operation of the maritime law was predicated only of the operation of that law as administered in the courts of admiralty, for it is not to be believed that there was any purpose to overrule *Atlee v. Packet Co.*, 21 Wall. 389, 395, decided at the same term and only about two months before *The Lottawanna* by a unanimous court including Mr. Justice Bradley himself, in which it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty each court was at liberty to adopt its own rules of decision. Moreover, the principal question at issue in *The Lottawanna* was whether the case of *The General Smith*, 4 Wheat. 438, should be overruled, in which it had been held that, in the absence of state legislation imposing the lien, a ship was not subject to a libel *in rem* in the admiralty for repairs furnished in her home port. The general expressions referred to relate to that state of the law—the absence of state legislation, as well as of legislation by Congress—and upon this the decision in *The General Smith* was upheld (p. 578). But in proceeding to discuss the subordinate question whether there was a lien under the state statute, it was held (p. 579): “It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessities to a vessel in her home port may be regulated in each State by State legislation.” And again (p. 581): “Whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. . . . It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.”

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Again, in *Workman v. New York City*, 179 U. S. 552, which, like *The Lottawanna*, was a proceeding in admiralty, the court, in quoting the declarations contained in that case respecting the general operation of the maritime law throughout the navigable waters of the United States, was dealing only with its application in the courts of admiralty. This is plain from what was said as a preface to the discussion (p. 557): "In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit v. Osborne* (1890), 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Art. III, sec. 2) upon the courts of the United States."

In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and enforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the state courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. For extending it to defendants, removal proceedings are the appropriate means.

Certainly there is no greater need for uniformity of

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adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the States. This was because the subject was within the police power, and the divergent exercise of that power by the States did not regulate, but only incidentally affected, commerce among the States. *Sherlock v. Alling*, 93 U. S. 99, 103; *Second Employers' Liability Cases*, 223 U. S. 1, 54. It required an act of Congress (Act of April 22, 1908, c. 149, 35 Stat. 65) to impose a uniform measure of responsibility upon the carriers in such cases. So, it required an act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) to impose a uniform rule of liability upon rail carriers for losses of merchandise carried in interstate commerce. *Adams Express Co. v. Croninger*, 226 U. S. 491, 504. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress. Among them are: Laws requiring locomotive engineers to be examined and licensed by the state authorities, *Smith v. Alabama*, 124 U. S. 465, 482; requiring such engineers to be examined for defective eyesight, *Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U. S. 96, 100; requiring telegraph companies to receive dispatches and transmit and deliver them diligently, *Western Union Telegraph Co. v. James*, 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington v. Georgia*, 163 U. S. 299, 304, 308, etc.; regulating the heating of passenger cars, *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S.

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628; prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made, *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 136, 137; a like result arising from rules of law enforced in the state courts in the absence of statute, *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 488, 491; statutes prohibiting the transportation of diseased cattle in interstate commerce, *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 630, 635; *Reid v. Colorado*, 187 U. S. 137, 147, 151; statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce, *Atlantic Coast Line R. R. Co. v. Mazursky*, 216 U. S. 122, even since the passage of the Carmack Amendment, *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U. S. 412, 417, 420; statutes regulating the character of headlights used on locomotives employed in interstate commerce, *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U. S. 280; *Vandalia R. R. Co. v. Public Service Commission*, 242 U. S. 255. All these cases affected the responsibility of interstate carriers. Until now, Congress has passed no act concerning their responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, so that these matters still remain subject to the regulation of the several States. We have held recently that even the anti-pass provision of the Hepburn Act (34 Stat. 584, 585, c. 3591, § 1) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 612.

In the very realm of navigation, the authority of the States to establish regulations effective within their own borders, in the absence of exclusive legislation by Con-

gress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the First Congress (Act of August 7, 1789, c. 9, § 4, 1 Stat. 53, 54; Rev. Stats., § 4235), and this court, in many decisions, has sustained local regulations of that character. *Cooley v. Board of Wardens*, 12 How. 299, 320; *Steamship Co. v. Joliffe*, 2 Wall. 450, 459; *Ex parte McNiel*, 13 Wall. 236, 241; *Wilson v. McNamee*, 102 U. S. 572; *Olsen v. Smith*, 195 U. S. 332, 341; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 195.

It is settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 252; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208; *Hamilton v. Vicksburg, Shreveport & Pacific Railroad*, 119 U. S. 280; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8; *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 165 U. S. 365; *Manigault v. Springs*, 199 U. S. 473, 478.

So, as to harbor improvements, *County of Mobile v. Kimball*, 102 U. S. 691, 697; improvements and obstructions to navigation, *Huse v. Glover*, 119 U. S. 543, 548; *Leovy v. United States*, 177 U. S. 621, 625; *Cummings v. Chicago*, 188 U. S. 410, 427; inspection and quarantine laws, *Gibbons v. Ogden*, 9 Wheat. 1, 203; wharfage charges, *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 563; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 702; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 447; tolls for the use of an improved waterway, *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 295.

So, of provisions fixing the tolls for transportation upon an interstate ferry, *Port Richmond &c. Ferry Co. v. Hudson County*, 234 U. S. 317, 331; or upon vessels plying be-

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tween two ports located within the same State, *Wilmington Transportation Co. v. California Railroad Commission*, 236 U. S. 151, 156.

In each of these cases, except the last, which related to intrastate transport, the state regulation had an incidental effect upon the very conduct of navigation in interstate or foreign commerce. If in such cases the States possess the power of regulation in the absence of inconsistent action by Congress, much more clearly do they possess that power where Congress is silent, with respect to a liability which arises but casually, through the accidental injury or death of an employee engaged in a maritime occupation.

Indeed, with respect to injuries that result in death, it already is settled that although the general maritime law, like the common law, afforded no civil remedy for death by wrongful act (*The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201, 209), yet a right of action created by statute is enforceable in a state court although the tort was committed upon navigable water (*Steamboat Co. v. Chase*, 16 Wall. 522, 533; *Sherlock v. Alling*, 93 U. S. 99, 104), and the liability arising out of a state statute in such a case will be recognized and enforced in the admiralty (*The Hamilton*, 207 U. S. 398), although not by proceeding *in rem* unless the statute expressly creates a lien (*The Corsair*, 145 U. S. 335, 347).

In *Sherlock v. Alling*, *supra*, which was an action in a state court and based upon a state statute to recover damages for a death by wrongful act occurring in interstate navigation, it was contended that the statute could not be applied to cases where the injury was caused by a marine tort, without interfering with the exclusive regulation of commerce vested in Congress. The court, after declaring that any regulation by Congress, or the liability for its infringement, would be exclusive of state authority, proceeded to say, by Mr. Justice Field (93 U. S. 104): "But with reference to a great variety of matters touching the

rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies," etc.

I deem *The Hamilton*, *supra*, to be a controlling authority upon the question now presented. It was there held, not only that the constitutional grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, leaves open the common-law jurisdiction of the state courts over torts committed at sea, but also that it leaves the States at liberty to change the law respecting such torts by legislation, as by a statute creating a liability for death by wrongful act, which was the particular legislation there in question.

To what extent uniformity of decision should result from the grant of jurisdiction to the courts of the United States concurrent with that of the state courts, is a subject that repeatedly has been under consideration in this court, but it never has been held that the jurisdictional grant required state courts to conform their decisions to those of the United States courts. The doctrine clearly

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deducible from the cases is that in matters of commercial law and general jurisprudence, not subject to the authority of Congress or where Congress has not exercised its authority, and in the absence of state legislation, the federal courts will exercise an independent judgment and reach a conclusion upon considerations of right and justice generally applicable, the federal jurisdiction having been established for the very purpose of avoiding the influence of local opinion; but that where the State has legislated, its will thus declared is binding, even upon the federal courts, if it be not inconsistent with the expressed will of Congress respecting a matter that is within its constitutional power. The doctrine concedes as much independence to the courts of the States as it reserves for the courts of the Union. *Burgess v. Seligman*, 107 U. S. 20, 33, 34; *East Alabama Ry. Co. v. Doe*, 114 U. S. 340, 353; *Gibson v. Lyon*, 115 U. S. 439, 446; *Anderson v. Santa Anna*, 116 U. S. 356, 362; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 372; *Folsom v. Ninety-six*, 159 U. S. 611, 625; *Stanly County v. Coler*, 190 U. S. 437, 444; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 357, 360.

In *Baltimore & Ohio R. R. Co. v. Baugh*, *supra*, the court had under review the judgment of a circuit court of the United States in an action by a locomotive fireman injured through negligence of the engineer. The cause of action arose in the State of Ohio, and the question presented was whether the engineer and fireman were fellow-servants. Under the decisions of the Ohio courts they were, but this court held that, as there was no state statute, the question should not be treated as a question of local law, to be settled by an examination merely of the decisions of the state court of last resort, but should be determined upon general principles; the courts of the United States being under an obligation to exercise an independent judgment. The court, by Mr. Justice Brewer, said (149 U. S. 378): "There is no question as to

the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution."

In other words, the general effect of the question upon interstate commerce rendered it one of the class that called for the application of general principles; nevertheless, state legislation would be controlling—in the absence of valid legislation by Congress, of course.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, *supra*, the doctrine was concisely stated by Mr. Justice Gray, speaking for the court, as follows (169 U. S. 136): "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State; and may be changed by its legislature, except so far as restrained by the constitution of the State or by the Constitution or laws of the United States."

I freely concede the authority of Congress to modify the rules of maritime law so far as they are administered in the federal courts, and to make them binding upon the courts of the States so far as they affect interstate or international relations, or regulate "commerce with foreign

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nations, and among the several States, and with the Indian tribes." What I contend is that the Constitution does not, *proprio vigore*, impose the maritime law upon the States except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution; that is to say, in the prize jurisdiction, and the peculiar maritime process *in rem*; and that as to civil actions *in personam* having a maritime origin, the courts of the States are left free, except as Congress by legislation passed within its legitimate sphere of action may control them; and that Congress, so far from enacting legislation of this character, has from the beginning left the state courts at liberty to apply their own systems of law in those cases where prior to the Constitution they had concurrent jurisdiction with the admiralty, for the saving clause in the Judiciary Act necessarily has this effect.

Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject matter can be raised *by implication*, can, in the absence of legislation, have a greater effect in limiting the legislative powers of the States than that which resulted from the *express* grant to Congress of an authority to regulate interstate commerce,—the limited effect of which, in the absence of legislation by Congress, we already have seen. The prevailing opinion properly holds that, under the circumstances of the case at bar, although plaintiff in error was engaged in interstate commerce, and the deceased met his death while employed in such commerce, the provisions of the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65) do not apply, because they cover only railroad operations and work connected therewith, whereas the deceased was employed upon an ocean-going ship. In effect it holds also that in the absence of applicable legislation by Congress the express grant of authority to regulate such commerce, as contained in the Constitution, does not exclude the operation of the

state law. It seems to me a curious inconsistency to hold, at the same time, that the rules of the maritime law exclude the operation of a state statute without action by Congress, although the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject matter; and most remarkable that this result is reached in the face of the fact that the judicial power in cases of admiralty jurisdiction has been put into effect by Congress subject to an express reservation of the previous concurrent jurisdiction of the courts of law over actions of this character. This, besides ignoring the reservation, gives a greater potency to an implied power than to a power expressly conferred.

The effect of the present decision cannot logically be confined to cases that arise in interstate or foreign commerce. It seems to be thought that the admiralty jurisdiction of the United States has limits coextensive with the authority of Congress to regulate commerce. But this is not true. The civil jurisdiction in admiralty in cases *ex contractu* is dependent upon the subject matter; in cases *ex delicto* it is dependent upon locality. In cases of the latter class, if the cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged in commerce at all, or (probably) not upon any vessel, the maritime courts have jurisdiction. *Propeller Genessee Chief v. Fitzhugh*, 12 How. 443, 452; *The Propeller Commerce*, 1 Black, 574, 578, 579; *The Belfast*, 7 Wall. 624, 636, 638, 640; *Ex parte Boyer*, 109 U. S. 629, 632; *In re Garnett*, 141 U. S. 1, 15, 17. It results that if the constitutional grant of judicial power to the United States in cases of admiralty and maritime jurisdiction is held by inference to make the rules of decision that prevail in the courts of admiralty binding *proprio vigore* upon

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state courts exercising a concurrent jurisdiction in cases of maritime origin, the effect will be to deprive the several States of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters.

The following additional consideration is entitled to great weight: The same Judiciary Act which in its 9th section conferred upon the district courts of the United States original cognizance of civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, in its 25th section allowed a writ of error from this court to review the final judgment or decree of a state court of last resort resulting from a decision overruling any special claim of right, privilege, or exemption based upon the construction of any clause of the Constitution or statutes of the United States. By later legislation the review was broadened (Act of February 5, 1867, c. 28, § 2, 14 Stat. 385, 386; § 709, Rev. Stats.; § 237, Jud. Code), and by recent legislation the writ of certiorari has been substituted for the writ of error in many cases (Act of September 6, 1916, c. 448, 39 Stat. 726). But, at all times, the right to review in this court the decisions of the state courts upon questions of federal law has existed, so that if by the true construction of Art. III, § 2, of the Constitution, or of § 9 of the Judiciary Act of 1789, it had been the right of parties suing or sued in state courts upon causes of action of a maritime nature to insist that their cases should be determined according to the rules of decision found in the law maritime, this right or immunity might have been asserted as a federal right, and its denial made the ground of a review of the resulting judgment, under a writ of error (or, now, a writ of certiorari), from this court to the state court of last resort. Yet, until the present case, and others submitted

at the same time, the reported decisions of this court show not a trace of any such question raised. I can conceive of no stronger evidence to prove that from the foundation of the government until the present time it has been the opinion of the Bar and of the Judiciary, in the state courts as well as in the courts of the United States, that it was not the right of parties suing or sued in state courts of law or equity upon causes of action arising out of maritime affairs, to have them decided according to the principles that would have controlled the decision had the suits been brought in the admiralty courts.

There is no doubt that, throughout the entire life of the nation under the Constitution, state courts not only have exercised concurrent jurisdiction with the courts of admiralty in actions *ex contractu* arising out of maritime transactions, and in actions *ex delicto* arising upon the navigable waters, but that in exercising such jurisdiction they have, without challenge until now, adopted as rules of decision their local laws and statutes, recognizing no obligation of a federal nature to apply the law maritime. State courts of last resort, in several recent cases, have had occasion to consider the precise contention now made by plaintiff in error, and upon full consideration have rejected it. *Lindstrom v. Mutual Steamship Co.*, 132 Minnesota, 328; *North Pacific S. S. Co. v. Industrial Accident Commission* [Cal.], 163 Pac. Rep. 199; *Kennerson v. Thames Towboat Co.*, 89 Connecticut, 367, 373. See also *Matter of Walker v. Clyde Steamship Co.*, 215 N. Y. 529, 531; *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514 (this case). I have found no case to the contrary except a decision by the United States District Court for the Northern District of Ohio in *Schuede v. Zenith S. S. Co.*, 216 Fed. Rep. 566, now under consideration by this court. The reasoning is unsatisfactory, and it was repudiated in *Keithley v. North Pacific S. S. Co.*, 232 Fed. Rep. 255, 259.

I may remark, in closing, that there is no conflict be-

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tween the New York Workmen's Compensation Act and the acts of Congress for limiting the liability of ship-owners (Rev. Stats., §§ 4283-5; Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57). So long as the aggregate liabilities of the owner, including that under the New York law, do not amount to as much as the interest of the owner in the vessel and freight pending, the act of Congress does not come into play. Where it does apply, it reduces all liabilities proportionally, under whatever law arising; the liability under the New York law along with the others. *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 552, 558; *The Hamilton*, 207 U. S. 398, 406; *Richardson v. Harmon*, 222 U. S. 96, 104, 105.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in the dissent, both upon the grounds stated by MR. JUSTICE HOLMES and upon those stated by MR. JUSTICE PITNEY.